Jurisdictional Statement

81-634

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SHARON STEEL CORPORATION and
SUMMIT SYSTEMS, INC.,

Appellants,

v.

INSURANCE COMMISSIONER OF NEW HAMPSHIRE and
NASHUA CORPORATION,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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September 30, 1981

Question Presented

Whether the New Hampshire Security Takeover Disclosure Act, as applied to stock purchases by non-residents on national securities markets, violates the Commerce and Supremacy Clauses of the United States Constitution.

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INSURANCE COMMISSIONER OF NEW HAMPSHIRE and
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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

This is an appeal from a decision of the New Hampshire Supreme Court upholding, despite constitutional challenges, New Hampshire's authority to prevent securities purchases by non-residents in national securities markets. The New Hampshire decision is the first by any state's highest court to determine the constitutionality of a state anti-takeover statute. This appeal raises questions under the Commerce and Supremacy Clauses with far more sweeping implications than some which this Court will consider in *Edgar* v. *Mite Corp.*, 101 S. Ct. 2043 (1981) ("*Edgar* v. *Mite*"), *noting prob. juris. from Mite Corp.* v. *Dixon*, 633 F. 2d 486 (7th Cir. 1980).

Opinions Below

The opinion of the New Hampshire Supreme Court is unofficially reported at [Current] Blue Sky L. Rep. (CCH) ¶ 71,630 (N.H. July 2, 1981) and included in the Appendix ("App.") at 1-13 The June 15, 1980 opinion and order

of the New Hampshire Insurance Commissioner, App. at 27-41, and the August 7, 1980 interlocutory transfer order of the New Hampshire Superior Court, Merrimack County, App. at 14-26, are unreported.

Jurisdiction

This appeal is taken from a final judgment of the New Hampshire Supreme Court dated July 2, 1981 holding that the New Hampshire Security Takeover Disclosure Act, N.H. Rev. Stat. Ann. ch. 421-A (Supp. 1979) (the "New Hampshire Act"), as applied, is not repugnant to the Commerce and Supremacy Clauses. A notice of appeal to this Court was filed with the Clerk of the New Hampshire Supreme Court on September 22, 1981. App. at 46-49. The Supreme Court has jurisdiction over this appeal under 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions

Article I, § 8, cl. 3 of the United States Constitution provides in part:

> The Congress shall have Power ... To regulate Commerce with foreign Nations and among the several States.

Article VI, cl. 2 of the United States Constitution provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 13(d)(1) of the Securities Exchange Act of 1934 provides in part:

> Any person who . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, *within ten days after* such acquisition, send to the issuer [and] . . . each exchange where the security is traded, and file with the Commission, a statement. . . .

15 U.S.C. § 78m(d) (1) (1976) (emphasis added).

Sections 3, 5, and 6 (II) of the New Hampshire Act provide in part:

> 3 No offerer shall make a takeover bid unless *at least 20 days prior thereto* he files with the commissioner and the target company a registration statement . . . and publicly discloses the material terms of the offer.
>
> 5 Within 20 days after the filing of a registration statement . . . the commissioner shall order a hearing . . . or if so requested by the target company, within 15 days following such filing. . . . Any initial hearing shall commence within 60 days after the filing of a registration statement. . . .
>
> 6(II) Within 60 days after the completion of a hearing or hearings . . . the commissioner . . . shall issue an order. . . .

N.H. Rev. Stat. Ann. ch. 421-A: 3, 5, 6 (II) (Supp. 1979) (emphasis added).

For the complete texts of Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d), SEC Rule 13d-1, 17 C.F.R. § 240.13d-1 (1980), and the New Hampshire Act, N.H. Rev. Stat. Ann. ch. 421-A (Supp. 1979) *see* App. at 47-64.

Statement of the Case

Parties — Appellant Sharon Steel Corporation ("Sharon"), a Pennsylvania corporation with headquarters in Ohio, manufactures and sells basic steel mill products. Apellant Summit Systems, Inc. ("Summit"), a wholly-owned subsidiary of Sharon principally engaged in the business of securities investing, is a Delaware corporation with its executive office in Florida. Sharon and Summit do not maintain offices in New Hampshire.*

Appellee the Insurance Commissioner of New Hampshire (the "Commissioner") administers and enforces the New Hampshire Act, N.H. Rev. Stat. Ann. ch. 421-A: 9, 11 (Supp. 1979).

Appellee Nashua is a Delaware corporation with headquarters in New Hampshire. A multinational corporation, Nashua has substantial facilities and properties located in ten states, Puerto Rico, and four foreign countries.

Nashua is subject to the filing and reporting requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1976) (the "Exchange Act"), and its stock is registered with the Securities and Exchange Commission (the "SEC").** Nashua's stock is listed and traded on the New York and Toronto Stock Exchanges. Its transfer agent is located in Massachusetts. Less than fifteen percent of Nashua's stock is owned by New Hampshire residents, and nearly half of that in one block. More than eighty-five percent is held by residents of forty-eight states and fourteen foreign countries.

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* The listing of parents, subsidiaries, and affiliates required by Sup. Ct. R. 28.1 is contained in App. M at 86.

** The SEC appeared as an *amicus curiae* before the New Hampshire Supreme Court and argued that the New Hampshire Act is unconstitutional.

Sharon's Purchases through Summit—In nine transactions during 1979 and 1980, Sharon, through Summit, purchased a total of 476,100 shares, or approximately 10.25 percent, of Nashua's stock. Of these shares, 301,900 were purchased in four transactions during October and November 1979. Sharon then disclosed these purchases by filing with the SEC a Statement on Schedule 13D, the statement required of owners of more than five percent of any equity security registered under the Exchange Act.

Appellants purchased no additional Nashua stock for nearly four months. In March 1980, Sharon, through Summit, bought 174,200 more shares of Nashua in five transactions. Since then, appellants have made no further purchases of Nashua stock.

All of the purchases were commonplace block transactions on the New York Stock Exchange (the "Stock Exchange") or in the over-the-counter market. Three of the transactions were executed on the New York Stock Exchange by stock brokers located in New York City. A stock broker located in Georgia executed the other six transactions in the over-the-counter market. In eight of these transactions, the brokers identified potential sellers by using AutEx, a nationwide electronic network which communicates information concerning potential block trades.

No Nashua stock was sold to Sharon or Summit by any shareholder from New Hampshire. The sellers were major financial institutions with headquarters in New York, Georgia, and Massachusetts.

Prior Proceedings—On April 2, 1980, in an *ex parte* proceeding, Nashua petitioned the Commissioner for a

cease and desist order against Sharon and Summit under the New Hampshire Act, N.H. Rev. Stat. Ann. ch. 421-A: 11(I) (Supp. 1979). The Commissioner issued the order requiring Sharon and Summit to stop buying Nashua stock and to file the registration statement required by the New Hampshire Act. App. at 44. Later the Commissioner held hearings on several issues, including the constitutionality of the New Hampshire Act.*

The Commissioner subsequently confirmed the cease and desist order and upheld the constitutionality of the New Hampshire Act. App. at 27. Sharon and Summit appealed to the Superior Court, Merrimack County, which transferred the appeal to the New Hampshire Supreme Court. App. at 14. Nashua then intervened.

The New Hampshire Supreme Court held that the New Hampshire Act applied to Sharon and Summit's purchases of Nashua stock and does not violate the Commerce and Supremacy Clauses of the United States Constitution.** App. at 1. Sharon and Summit still own the Nashua shares and remain subject to the Commissioner's cease and desist order.

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* Appellants raised the constitutional questions in a responsive pleading filed with the Commissioner on May 3, 1980, reiterating them on appeal to the New Hampshire Superior Court, Merrimack County, on July 7, 1980 and the New Hampshire Supreme Court on August 7, 1980.

** The New Hampshire Supreme Court's ruling that Sharon's purchases through Summit were solicited transactions subject to the New Hampshire Act is not before this Court. Because the New Hampshire Supreme Court affirmed the Commissioner's construction of the New Hampshire Act, two constitutional issues considered below are not addressed by this appeal: (i) whether the advance disclosure requirements of the New Hampshire Act, N.H. Rev. Stat. Ann. ch. 421-A:3 (Supp. 1979), are preempted by newly adopted SEC Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1980) and (ii) whether the proration, best price, and withdrawal provisions of the New Hampshire Act, N.H. Rev. Stat. Ann. ch. 421-A: 7 (Supp. 1979), are preempted by federal laws governing the prompt settlement of open market transactions.

THE CONSTITUTIONALITY OF THE NEW HAMPSHIRE ACT PRESENTS SUBSTANTIAL FEDERAL QUESTIONS

I.

This Appeal Provides an Unrivalled Opportunity to Resolve Constitutional Issues Frequently Contested in Lower Courts

The New Hampshire Supreme Court's decision is the first by any state's highest court to rule on the merits of issues widely litigated in lower federal and state courts: the constitutionality of state anti-takeover laws under the Commerce and Supremacy Clauses. These issues have tremendous significance for the operation of the nation's securities markets and the future of securities litigation in the lower courts, as this Court recognized by noting probable jurisdiction over *Edgar* v. *Mite.*

The constitutionality of state anti-takeover laws is the subject of great controversy.* Although litigated frequently, the issue remains open. Most actions are dis-

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* Both circuit courts which have considered the issue on the merits have found state takeover laws, as applied to tender offers, to violate the Commerce and Supremacy Clauses. *Mite Corp.* v. *Dixon,* 633 F.2d 486 (7th Cir. 1980) (Illinois Act), *prob. juris. noted sub nom. Edgar* v. *Mite Corp.,* 101 S.Ct. 2043 (1981); *Great Western United Corp.* v. *Kidwell,* 577 F.2d 1256 (5th Cir. 1978) (Idaho Act), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.* 443 U.S. 173 (1979). *See Kennecott Corp.* v. *Smith,* 637 F.2d 181 (3rd Cir. 1980) (preliminary injunction against New Jersey Act), *perm. inj. on remand* 507 F. Supp. 1206 (D.N.J. 1981), *appeal docketed,* No. 81-1679 (3d Cir. April 1, 1981).

A vast majority of lower federal and state courts agree. *E.g., Hi-Shear Industries, Inc.* v. *Neiditz,* [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,805 (D. Conn. Dec. 16, 1980) (Connecticut Act); *Joseph E. Seagram & Sons, Inc.* v. *Wagner,* Nos. 81-2568, -2728, -2875 (E.D. La. July 31, 1981) (Louisiana Act); *Natomas Co.* v. *Bryan,* 512 F. Supp. 191 (D. Nev. 1981) (Nevada Act); *Canadian Pacific Enterprises, Inc.* v. *Krouse,* 506 F. Supp. 1192 (S.D. Ohio 1981) (Ohio Act), *appeal docketed,* No. 81-3083 (6th Cir. April 14, 1981); *Joseph E. Seagram & Sons, Inc.* v. *Marley,* [Current] Blue Sky L. Rep. (CCH) ¶ 71,627 (W.D. Okla. July 17, 1981) (Oklahoma

(*Footnote continued on following page*)

missed or abandoned long before the constitutional questions can be finally determined. Others are cluttered with unrelated procedural issues which prevent consideration of the constitutional issues.*

Apparently recognizing the widespread criticism on constitutional grounds, fifteen states have recently amended, repealed, or construed their anti-takeover statutes in an effort to eliminate perceived constitutional conflicts with federal rules governing tender offers.** Despite similar constitutional infirmities, no effort has been undertaken to rid state anti-takeover statutes of the constitutional problems resulting from their application to open market purchases.

Courts confronted with the application of state anti-takeover statutes to open market block transactions frequently avoid the constitutional questions by holding that the statutes do not apply to such transactions. *See, e.g., Chromalloy American Corp.* v. *Sun Chemical Corp.*, 483 F. Supp. 116, 118 (E.D. Mo. 1980); *Sheffield* v. *Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981); *UV Industries* v. *Sharon Steel Corp.*, [Current] Blue Sky L. Rep.

Act); *Crane Co.* v. *Lam*, 509 F. Supp. 782 (E.D. Pa. 1981) (Pennsylvania Act); *Kelly* v. *Beta-X Corp.*, 103 Mich. App. 51, 302 N.W.2d 596 (1981) (Michigan Act). *But see, e.g., Wylain, Inc.* v. *TRE Corp.*, 412 A.2d 338 (Del. Ch. Ct. 1980) (Delaware Act); *City Investing Co.* v. *Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979) (Indiana Act), *aff'd on other grounds*, 633 F.2d 56 (7th Cir. 1980); *Esmark, Inc.* v. *Strode*, [Current] Blue Sky L. Rep. (CCH) ¶ 71,629 (Ky. Ct. App. April 3, 1981) (Kentucky Act).

* The classic example is this Court's reversal on venue grounds of the Fifth Circuit in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), *rev'g* 577 F.2d 1256 (5th Cir. 1978) (Idaho Act found unconstitutional). Not surprisingly, the vast majority of these decisions are unreported. *See, e.g.*, the cases cited by the New Hampshire Superior Court, Merrimack County, App. at 22-23.

**See* 1981 Conn. Pub. Acts 81-121; 1981 Del. Laws H.B. 16; 1979 Fla. Laws ch. 79-381, *repealing* Fla. Investor Protection Act;

(Footnotes continued on following page.)

(CCH) ¶ 71,466 (N.Y. Sup. Ct. N.Y. Cty. 1979). *Contra Esmark, Inc.* v. *Strode,* [Current] Blue Sky L. Rep. (CCH) ¶ 71,629 (Ky. Ct. App. April 3, 1981). However, this case, in which the New Hampshire Act was held to apply to open market block transactions addresses the constitutional questions.

By noting probable jurisdiction over *Edgar* v. *Mite,* this Court has recognized the importance of the constitutional questions. However, the differences between *Edgar* v. *Mite* and this appeal underscore the need for plenary consideration here.

In *Edgar* v. *Mite,* Mite contends that the appeal is moot. Mite notes that it withdrew its tender offer for Chicago Rivet and is precluded by agreement from renewing the offer. It also refers to the federal court injunction which bars Illinois from enforcing its takeover law against Mite. Brief for Appellee at 7-12, *Edgar* v. *Mite.* Moreover, certain of the SEC's current rules governing tender offers, SEC Rule 14d-1 *et seq.*, 17 C.F.R. § 240.14d-1 (1980), were not in effect when Mite's tender offer began.

In this case, there is no question that there remains a live controversy. Appellants still own the Nashua stock

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Idaho Disclo. Reg. §§ 602-602A (eff. Feb. 6, 1981), 1A Blue Sky L. Rep. (CCH) ¶¶ 21,602-602A (Feb. 6, 1981); 1981 Ind. Acts H.B. 2067; 1981 Md. Laws ch. 776; 1980 Miss. Laws ch. 418; 1981 Nev. Stat. ch. 417; 1980 N.Y. Laws ch. 733; 1981 Okla. Laws S.B. 102; Okla. Sec. Comm'n R. R-TOR-3 §§ 1-20 (1981); 1981 Wis. Laws ch. 16; 1980 Va. Acts ch. 216. *See also* recent commentaries by four state securities administrators, Ga. Sec. Comm'n Rel., 1A Blue Sky L. Rep. (CCH) ¶ 18,504 (July 17, 1980); Ind. Sec. Comm'n Pol. Stmt., 1A Blue Sky L. Rep. (CCH) ¶ 24,655 (Feb. 19, 1980); Md. Sec. Rel., 1A Blue Sky L. Rep. (CCH) ¶ 30,563 (April 18, 1980); Pa. Sec. Comm'n Interp. Op., 2 Blue Sky L. Rep. (CCH) ¶ 48,681 (1981).

In March, 1981, a bill was introduced and passed in the New Hampshire Senate, App. at 81, in an attempt to eliminate many of the constitutional problems considered in this appeal. No action was taken by the New Hampshire House of Representatives on this bill before the legislature adjourned in June, 1981.

bought in 1979 and 1980. Summit and Sharon also remain subject to the Commissioner's cease and desist order. The New Hampshire and federal statutes and regulations governing stock market trading which applied when the Commissioner issued his cease and desist order are still in force.

Perhaps the most important distinction between *Edgar* v. *Mite* and this appeal stems from the difference between making a formal tender offer and buying stock on the open market. Because *Edgar* v. *Mite* is a tender offer case, it cannot address the issue of state regulation of trading on national securities markets.

This appeal, together with *Edgar* v. *Mite,* presents a unique opportunity for this Court to decide the merits of the constitutional claims as they apply to stock market trading *and* tender offers. Complete consideration of this appeal would help eliminate the dilemma now facing buyers who must either comply with state laws which disrupt trading in the nation's stock markets or risk civil and criminal penalties. It would also stem the forum shopping by corporations seeking to invoke state anti-takeover laws to prevent investments in their stock which now impairs the nation's securities markets and squanders countless hours of judicial resources.

II.

By Freezing Non-New Hampshire Purchasers Out of National Securities Markets the New Hampshire Act Imposes an Unconstitutional Burden On Interstate Commerce

The New Hampshire Act freezes a prospective buyer out of the national securities markets for 20 to 120 days plus the time required for hearings. N.H. Rev. Stat. Ann. ch. 421-A: 5, 6, 9, 11 (Supp. 1979). This disrupts trading among non-residents and creates artificial market condi-

tions outside New Hampshire without conferring any substantial benefit on local shareholders. As applied, the New Hampshire Act is a direct and substantial burden on interstate commerce conducted by non-residents.

The Commerce Clause permits only incidental regulation of interstate commerce by the states. *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199 (1925). Incidental regulation of interstate commerce by the states is permitted only if it serves a legitimate local interest without imposing a burden on commerce disproportionate to the putative local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *Accord, Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). To meet these requirements

> the State [must] justify [the State law] both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to protect the local interests at stake.

Hughes v. *Oklahoma*, 441 U.S. 322, 336 (1979).

Burden on Commerce—The New Hampshire Act is not restricted to New Hampshire residents or intrastate securities transactions. It is blatantly extraterritorial. Federal law permits open market purchases to be made as soon as one decides to buy. By contrast, New Hampshire requires a purchaser first to disclose publicly its intention to buy and then to wait for at least 20, and perhaps more than 120, days before buying any stock. N.H. Rev. Stat. Ann. ch. 421-A : 5, 6, 9, 11 (Supp. 1979). Freezing a prospective purchaser out of the national securities markets is a direct burden on commerce. *See Eure* v. *NVF Co.*, 79 CVS 4093 (N.C. Super. Ct. Wake Cty. May 15, 1980) (App. L), *appeal dismissed*, ___ N.C. ___, ___ S.E. 2d ___ (May 5, 1981). By reaching beyond New Hampshire's borders to freeze ordinary stock market trading between non-residents, the Commissioner imposes a direct and substantial burden on interstate commerce. *See, e.g., Mite Corp.* v. *Dixon*, 633 F.2d

486, 502 (7th Cir. 1980) *prob. juris. noted sub nom. Edgar* v. *Mite Corp.*, 101 S.Ct. 2043 (1981); *Kennecott Corp.* v. *Smith*, 507 F. Supp. 1206, 1224 (D.N.J. 1981).

As the SEC established in its *amicus* brief to the New Hampshire Supreme Court, such a freeze on trading, no matter how short, severely disrupts the nation's stock markets by influencing prices, discouraging institutional trading, and frustrating fruitful investment analysis. At the same time, a freeze on trading is completely incompatible with the long-established system of institutional trading where decisions to buy stock are made quickly and based on short-term analyses of value and market conditions. No one benefits from such drastic regulation of the free market; eventually, the shares of companies such as Nashua will become less attractive investment alternatives than those of companies with no ties to New Hampshire.

Local Interests—There is no connection between appellants' purchases and New Hampshire. Appellants—a Delaware corporation with headquarters in Florida and a Pennsylvania corporation with headquarters in Ohio—bought stock of Nashua, a Delaware corporation with extensive national and international operations and facilities. Brokers located in Georgia and New York identified most sellers by using the nationwide Autex system, executing all transactions on the Stock Exchange floor and in the over-the-counter market. The sellers were large financial institutions in New York, Georgia, and Massachusetts. The transactions were recorded by Nashua's transfer agent in Massachusetts, and the situs of the shares remained where they were issued, in Delaware.

The only ostensible local interest identified is the protection of New Hampshire investors. The New Hampshire Supreme Court held that the state law is intended to regulate "takeover attempts involving a possible change of control of companies headquartered in [New Hampshire] who likely would have a disproportionately large per-

centage of stockholders located here." App. at 12. Such an interest, however, has little weight "since none of the jurisdictional criteria for invoking the [state law] relate to the residence of shareholders." *Hi-Shear Industries, Inc.* v. *Campbell,* [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804 at 90,033 (D.S.C. Dec. 4, 1980) (construing South Carolina Act). That interest is particularly inapplicable here where less than fifteen percent of Nashua's stock is owned by New Hampshire residents and nearly half of that in one block. Moreover, the principal purpose of the New Hampshire Act is the protection of local business. N.H. Sen. Journal 455-65 (1977) (remarks of Sen. Trowbridge), App. at 69-79; N.H. House Journal 217 (1977), App. at 80. New Hampshire's attempt to protect local business at the expense of interstate commerce is not permissible. *See Great Western United Corp.* v. *Kidwell,* 577 F.2d at 1282.

The Commerce Clause requires that state statutes affecting interstate commerce be drawn narrowly. The state must demonstrate "the unavailability of non-discriminatory alternatives adequate to protect the local interest at stake." *Hughes* v. *Oklahoma,* 441 U.S. at 336; *see Great Western United Corp.* v. *Kidwell,* 577 F.2d at 1283. The Commissioner and the New Hampshire Supreme Court failed to present or consider *any* less burdensome means of protecting resident investors. Their failure to do so offends the Commerce Clause.

III.

The Even Handed Approach and Post-Purchase Disclosure Requirements of Federal Law Preempt the Pro-Management and Advance Disclosure Provisions of the New Hampshire Act

In order to protect local business, the New Hampshire legislature enacted an anti-takeover law with numerous

provisions favoring local management, including advance disclosure. N.H. Sen. Journal 455-65 (1977), App. at 69-79; N.H. House Journal 217 (1977), App. at 80. These provisions conflict squarely with the purposes and objectives of the Exchange Act. Where such conflicts arise, the Supremacy Clause dictates that the federal law prevail.

The New Hampshire Act cannot survive if it contradicts the letter or spirit of federal legislation. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . . U.S. Const. Art VI, cl. 2.

The New Hampshire Supreme Court recites, but fails to apply the controlling test: a state statute is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." App. at 7. *Hines* v. *Davodowitz*, 312 U.S. 52 (1941). *Accord, Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977). A court must "consider the relationship between state and federal law as they are interpreted and applied, not merely as they are written," *De Canas* v. *Bica*, 424 U.S. 351, 363-65 (1976), examine the facts carefully, *Hines* v. *Davidowitz*, 312 U.S. at 67, and compare federal and state law. *See also Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

One purpose of the federal securities laws is to control the timing of public disclosure regarding securities transactions to ensure orderly and efficient markets. *See Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 29-31 (1977). Those same laws also are designed to avoid a regulatory bias in favor of any participant in a corporate dispute. *See Kennecott Corp.* v. *Smith*, 637 F.2d 181, 188-91 (3d Cir. 1980); *Mite Corp.* v. *Dixon*, 633 F.2d at 494-96. The New Hampshire Act frustrates both of these federal purposes.

A. *Pro-Management Bias*—The New Hampshire Supreme Court completely ignored the most sweeping conflict between New Hampshire and federal law. Four characteristics of the New Hampshire Act are heavily biased in favor of incumbent management.

First, like the Idaho statute found unconstitutional in *Great Western United Corp.* v. *Kidwell*, the issuer's board of directors can exempt a particular takeover bid from the New Hampshire Act by endorsing it. N.H. Rev. Stat. Ann. ch. 421-A: 2(VI)(a)(6) (Supp. 1979). Under federal law, the issuer's board of directors cannot exempt any person purchasing more than five percent of its securities from the filing requirements of Section 13(d)(1) of the Exchange Act, 15 U.S.C. § 78m(d)(1) (1976) or SEC Rule 13d-1, 17 C.F.R. § 240.13d-1 (1980).

Second, New Hampshire allows issuers to request that the Commissioner convene hearings to determine whether resident shareholders are adequately protected. N.H. Rev. Stat. Ann. ch. 421-A: 5 (Supp. 1979). No such hearings are provided by the Exchange Act.

Third, New Hampshire grants incumbent management a private right of action. N.H. Rev. Stat. Ann. ch. 421-A: 11 (III). This "adds to the departure from neutrality and thus to the danger that the [s]tate statute is invalid." *Unitrode Corp.* v. *Dynamics Corp.*, 399 N.E. 2d 5, 9 (Mass. 1980). Issuers have no express or implied cause of action under Section 13(d) of the Exchange Act. *See, e.g., Sta-Rite Industries, Inc.* v. *Nortek, Inc.*, 494 F. Supp. 358 (E.D. Wis. 1980); *Gateway Industries* v. *Agency Rent A Car*, 495 F. Supp. 92 (N.D. Ill. 1980).

Finally, any vestige of neutrality is decimated by the Commissioner's power to convene hearings which can delay open market purchases for up to 120 days *plus* the time required to conduct the hearing, N.H. Rev. Stat. Ann. ch. 421-A: 5, 6, 9, 11 (Supp. 1979), one of the longest delays

allowed by any state takeover law. *See,* Note, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes*, 8 Ford. Urb. L. J. 913, 933 (1980); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U. L. Rev. 872, 901 (1978). Similar delays are not possible under federal law, which makes no provision for hearings. There is no question that extended delay serves the interest of the issuer's management. *Great Western United Corp.* v. *Kidwell,* 577 F.2d at 1278. This Court "ought not to second-guess Congress' judgment that delay grossly in excess of that contemplated by [federal law] redounds to the detriment of stockholders." *Mite Corp.* v. *Dixon,* 633 F.2d at 498. *Accord, Kennecott Corp.* v. *Smith,* 637 F.2d at 190.

The Exchange Act places the issuer's management and the purchasers of its stock on equal footing in the marketplace. H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976). The federal law "preserve[s] a balance between incumbent management and challenging groups so that neither has an undue advantage." *Kennecott Corp.* v. *Smith,* 637 F.2d at 188. State anti-takeover statutes which favor the issuer undermine this even handed approach. *Mite Corp.* v. *Dixon,* 633 F.2d at 495-99; *Great Western United Corp.* v. *Kidwell,* 577 F.2d at 1279-80.

B. *Timing of Disclosure*—The Exchange Act and the New Hampshire Act have fundamentally different disclosure requirements for open market purchases of more than five percent of a company's stock. The New Hampshire Act requires public disclosure *twenty days before* purchases are made; the Exchange Act requires a public disclosure within *ten days after* the purchase. N.H. Rev. Stat. Ann. ch. 421-A: 3 (Supp. 1979); Section 13(d), 15 U.S.C. § 78m(d) (1976). The conclusion of the New Hampshire Supreme Court that "there is no genuine conflict" between the two, App. at 9, rests on an erroneous literal comparison.

Naturally, one can literally comply with both laws by making redundant disclosure, a New Hampshire disclosure

twenty days before any purchases are made and a federal disclosure ten days after the trade. But to require advance disclosure of open market purchases is contrary to the express intent of Congress, which rejected such a scheme three times in favor of the post-purchase disclosure now mandated by Section 13(d).*

Section 13(d) of the Exchange Act reflects Congress' concern that the nation's securities markets not be disrupted. Its sponsor explains:

> While some people might say this information should be filed before the securities are acquired, *disclosure after the transaction avoids upsetting the free and open auction market* where buyer and seller normally do not disclose the extent of their interests and avoids prematurely disclosing the terms of privately negotiated transactions.

113 Cong. Rec. 856 (1967) (remarks of Sen. Williams) (emphasis added). As this Court has said, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

Congress' careful choice of the word "after" in Section 13(d) reflects its concern that advance disclosure would

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* In 1965, Congress rejected a proposed twenty-day prenotification requirement. *See* 111 Cong. Rec. 28257-28259 (1965). In 1967, Congress rejected a five-day prenotification requirement. S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 72-75, 87-89, 98, 105, 139-40, 151, 163, 245 (1967); *Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 44-46, 50-54 (1968). Congress rejected yet another prenotification proposal in 1970. *See Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970). *See generally* Brief for *Amicus Curiae* SEC at 14-18, *Edgar* v. *Mite Corp.*

disrupt the securities markets. *Eure* v. *NVF Co.*, No. 79 CVS 4093 (N. Car. Super. Ct. Wake Cty. May 15, 1980), *appeal dismissed*, __N.C. __, __ S.E. 2d __ (May 5, 1981). No state may second-guess Congress' judgment that post-purchase disclosure is superior. *See Mite Corp.* v. *Dixon*, 633 F.2d at 490-99; *Kennecott Corp.* v. *Smith*, 637 F.2d at 190; *Great Western United Corp.* v. *Kidwell*, 577 F.2d at 1279.

CONCLUSION

The Commerce and Supremacy Clause questions raised by this appeal are of particular importance to the national securities markets. Sharon and Summit respectfully request that this Court note probable jurisdiction and order full briefing and oral argument.

Dated: September 30, 1981

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Appendix

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81-634

No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SHARON STEEL CORPORATION and
SUMMIT SYSTEMS, INC.,

Appellants,

v.

INSURANCE COMMISSIONER OF NEW HAMPSHIRE and
NASHUA CORPORATION,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

APPENDIX TO JURISDICTIONAL STATEMENT

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Merrimack
No. 80-333

PART A

Opinion and Judgment of the New Hampshire Supreme Court

SHARON STEEL CORPORATION *& a.*

v.

FRANK E. WHALAND

July 2, 1981

Devine, Millimet, Stahl & Branch P.A., of Manchester, and *Shearman & Sterling*, of New York (*Danforth Newcomb & a.* on the brief, and *Mr. Newcomb* orally), for the plaintiffs.

Gregory H. Smith, acting attorney general (*Andrew R. Grainger*, assistant attorney general *& a.* on the brief and *Mr. Grainger* orally), for the defendant.

Hamblett & Kerrigan P.A., of Nashua, and *Davis Polk & Wardwell*, of New York (*Steven F. Goldstone & a.* on the brief, and *Mr. Goldstone* orally), for the intervenor, Nashua Corporation.

William H. Shaheen, United States Attorney for the District of New Hampshire (*James J. Junewicz*, special counsel *& a.* on the brief, and *Mr. Junewicz* orally), for the Securities and Exchange Commission, as amicus curiae.

PER CURIAM. This is an interlocutory transfer to this court without ruling of an appeal from a decision of the insurance commissioner to the superior court under section 12 of RSA ch. 421-A Supp. 1979), this State's "Security Takeover Disclosure Act" (act).

The plaintiffs are Sharon Steel Corporation (Sharon), organized under Pennsylvania law with its principal place of business in Ohio, and Summit Systems, Inc. (Summit), organized under Delaware law with its principal place of

business in Florida. They appeal from an opinion of the defendant, Frank E. Whaland, the New Hampshire Insurance Commissioner (commissioner), whose order continued in effect a cease-and-desist order forbidding the plaintiffs from purchasing or offering to purchase, or in any way acquiring or controlling the stock of Nashua Corporation pending compliance with the act. Nashua Corporation (Nashua) is organized under the laws of Delaware, with its principal place of business in Nashua, New Hampshire. About 1,100 residents of New Hampshire own ten to fifteen per cent of Nashua's outstanding shares.

The commissioner's opinion and order were rendered after hearings on Nashua's petition alleging that on March 19, 1980, Summit and Sharon beneficially owned 476,100 shares of Nashua's common stock, which represented 10.252 per cent of its common stock outstanding. Nashua further alleged that the plaintiffs' solicitations of sales, which had resulted in the above acquisition of its stock, constituted a "takeover bid" as defined in RSA 421-A:2 VI (Supp. 1979) and that the plaintiffs had violated diverse sections of RSA ch. 421-A (Supp. 1979). A cease-and-desist order was issued by the commissioner. He also sought an injunction against the plaintiffs, which was granted by the Superior Court (*Cann*, J.) pursuant to RSA 421-A:11 (Supp. 1979).

The issues presented on this transfer are: (1) whether our "Security Takeover Disclosure Act," RSA ch. 421-A (Supp. 1979), which provides that a "takeover bid" does not include "[a]n offer by or through a broker-dealer in the ordinary course of his business without solicitation of orders to sell equity securities of the target company," RSA 421-A:2 VI (a) (1) (Supp. 1979), applies to the block transactions executed on national security markets by the plaintiffs; and (2) whether the act, as applied to the block transactions of the plaintiffs, is constitutional under the Supremacy Clause and the Commerce Clause of the United States Constitution.

I. Facts and Opinion of the Commissioner

The plaintiffs' principal brief states that "[t]he facts are straightforward and undisputed." It is not contested that

the plaintiffs' acquisitions caused them to become "a record or beneficial owner of more than 5 per cent of any class of the issued and outstanding equity securities" of Nashua, thus bringing their actions within the definition of "takeover bid" under the act unless covered by one of the statutory exclusions. RSA 421-A:2 VI (Supp. 1979). The plaintiffs, however, claim that their acquisitions do not constitute a takeover bid because they were effected by means of "[a]n offer by or through a broker-dealer in the ordinary course of his business *without solicitation of orders to sell* equity securities of the target company." RSA 421-A:2 VI (a) (1) (Supp. 1979). (Emphasis added.)

There was introduced in evidence a schedule 13D under the Securities Exchange Act of 1934 (15 U.S.C. § 78 m (a) (1) (1976)) filed by the plaintiffs with the Securities and Exchange Commission and dated November 15, 1979. This showed that plaintiff Summit owned at that time 301,900 shares of Nashua stock, which was five per cent or more of Nashua's shares outstanding. It was stated therein that "Sharon and Summit periodically will review Summit's investment and may at any time determine to increase or decrease it, depending upon various factors including but not limited to, the price of securities of Nashua and terms and conditions for their sale."

The *Wall Street Journal* carried an article reporting this Schedule 13D filing in its November 26, 1979 edition. There was also evidence of a press release on the matter at about that time. The cover letter with the copy of the Schedule 13D sent to Nashua stated that a copy of that schedule was being sent to each of the exchanges on which Nashua's common stock is listed. There was evidence of activity in Nashua stock in the late afternoon of November 27, 1979, and thereafter.

The plaintiffs acquired their eventual total of 476,100 shares of Nashua common stock in nine separate open market block transactions between October 11, 1979, and March 25, 1980. Brokers who were involved in eight of the nine purchases testified. There was evidence as to broker

conduct in general, as well as to the specific conduct of the brokers involved in these transactions. There was also expert testimony on large block trading by "Aut-Ex," which provides interconnecting video terminals among several hundred clients interested in large block trading, and which was characterized by a witness as a "mechanical salesman." Such large block trading is also done by means of the daily "block list," which is updated every morning by brokerage houses. The list is distributed to all brokers in a firm and provides the basis for the brokerage houses showing both the buy and the sell side for the clients on a national hook-up.

There was also testimony of an understanding in the securities industry that once a customer makes an initial large purchase in the stock of a company, the brokerage house will, on behalf of that customer, solicit further stock in the company, unless the customer expressly instructs the brokerage house not to do so. The commissioner found that "[t]hese solicitation methods were clearly employed on behalf of Offeror [plaintiff] Posner."

On the evidence presented, the commissioner arrived at the following conclusion. The plaintiffs "engaged in a course of conduct which had as its natural and foreseeable consequence the solicitation of orders to sell Nashua common stock. Offerors [plaintiffs] cannot disclaim this solicitation. As persons familiar with the customs and practices of the securities industry, they knew or had reason to know that just such solicitation would take place." Consequently, the commissioner ruled that the plaintiffs were not entitled to the broker-dealer exemption under the act, RSA 421-A:2 VI (a) (1) (Supp. 1979) and were engaged in making a takeover bid within the meaning of the act. He further continued his cease-and-desist order, thereby preventing the plaintiffs from purchasing or offering to purchase, or in any way acquiring or controlling, the stock of Nashua Corporation pending compliance with the "Security Takeover Disclosure Act," RSA 421-A:1 (Supp. 1979). The plaintiffs appealed the commissioner's order to the Superior Court (*Cann*, J.) who transferred without ruling the questions involved.

The plaintiffs state that whether the block trading practices they used in obtaining their stock in Nashua constitute solicitation is a question of first impression. Our act does not define solicitation, and apparently neither does any other business takeover act.

Defendant commissioner and intervenor Nashua maintain that the broker-dealer exemption claimed by the plaintiffs is designed to exclude from the act's definition of a takeover bid the ordinary anonymous open market transaction in which buy orders and sell orders meet independently without the sell order being solicited by the buyer. They maintain further that any solicitation destroys the anonymity of the auction market and puts added pressure on sellers. They also argue that the act does not attempt to distinguish between differing types or degrees of solicitation, but simply requires an "offeror" to comply with the act unless the acquisition of more than five per cent of outstanding stock is accomplished "without solicitation of orders to sell. . . ." RSA 421-A:2 VI (a) (1) (Supp. 1979).

The commissioner in his opinion stated:

> "that the central purpose of the statute is to provide advance disclosure to shareholders of the circumstances of those buyers of shares who may be acquiring control of the company. . . . Two considerations of fairness underlie this ethical premise: First, that the selling price of shares that carry control will normally reflect a premium for such control; and, second, that a shareholder before he decides to sell the element of control is entitled to disclosure as to who the new controlling authority will be."

No such considerations of fairness apply if the sell order is unsolicited because the buyer has purchased only stock which has come to market without his solicitation—hence, the exemption under RSA 421-A:2 VI (a) (1) (Supp. 1979).

The plaintiffs maintain, on the other hand, that their method of acquiring Nashua stock solely by open market purchases does not constitute a takeover bid even if it is aimed at acquiring control of a target company. *See Matter of*

City Investing Co., 411 N.E.2d 420, 429 (Ind. App. 1980). Depending on the accompanying circumstances, however, open market purchases can be considered as having the essentials of a takeover bid. *See UV Industries, Inc. v. Posner*, 466 F. Supp. 1251, 1258 (D. Me. 1979); *Sheffield v. Consolidated Foods Corp.*, 276 S.E.2d 422, 437, 441-42 (N.C. 1981).

The fact, among others, that there was evidence that the plaintiffs could have expressly instructed their brokers that there should be no solicitation constitutes a weighty accompanying circumstance. Such an instruction would have prevented the use of "Aut-Ex" and daily "block lists" by the broker-dealers to publicize the extent of large block interest in Nashua stock and thereby to solicit sell orders. We hold that the record supports the commissioner's decision on this issue of the case, namely, that the plaintiffs do not come within RSA 421-A:2 VI (a) (1) (Supp. 1979), which would exclude them from being involved in a takeover bid under our act, and that the act, therefore, applies to their transactions. *See UV Industries, Inc. v. Sharon Steel Corp.*, 466 F. Supp. at 1258. *See also Calumet Industries, Inc. v. MaClure*, 464 F. Supp. 19, 32 (N.D. Ill. 1978) (definition of "solicitation" in conjunction with proxies).

II. Preemption Under the Supremacy Clause

Article VI of the Federal Constitution provides in part as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Our first inquiry is whether Congress has prohibited State regulation of the field in question either by explicit statement in the federal statute or by implication in its structure and purpose. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973). There is no express language of preemption in the applicable provisions of the Securities Exchange Act of 1934 (SEA). *See* 15 U.S.C. §§ 78 m (d)-(e), n (d)-(f) (hereinafter the Williams Act). Nor is the statutory scheme so pervasive that an implicit congressional

intent to preempt parallel State legislation may fairly be inferred. *See Pennsylvania v. Nelson,* 350 U.S. 497, 504 (1956). On the contrary, section 28 (b) of SEA (15 U.S.C. § 78bb (a)) provides that "[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." "This section was plainly intended to protect, rather than to limit, state authority." *Leroy v. Great Western United Corp.,* 443 U.S. 173, 182 (1979). Historically, state regulation has played a coordinate role in the securities field. *See Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 137 (1973).

Even though there may be no congressional enactments that explicitly or implicitly exclude all State legislation in the same field, federal statutes nevertheless override any state laws with which they conflict. *Appeal of New England Power Co.,* 120 N.H. , , 424 A.2d 807-811 (1980). The test is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Avocado Growers v. Paul,* 373 U.S. 132, 141 (1963) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). This determination requires us to consider "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.,* 430 U.S. 519, 526 (1977).

The Williams Act was designed to close the gap in the disclosure requirements of the federal securities laws by bringing cash tender offers, which previously had been virtually unregulated, within the ambit of those laws. *Mite Corp. v. Dixon,* 633 F.2d 486, 492 (7th Cir. 1980). The dominant theme of that act is the "protection of investors who are confronted with a tender offer." *Piper v. Chris-Craft Industries,* 430 U.S. 1, 35 (1977). This is accomplished by requiring the disclosure of pertinent information to the stockholders when a person seeks to obtain control of a corporation. The principal disclosure provisions of the Williams Act are sections 13 (d) (15 U.S.C. § 78 m (d)) and 14 (d) (15 U.S.C. § 78 n

(d)). Section 13 (d) requires that a purchaser of any equity security registered pursuant to the SEA file a Schedule 13D with the Securities and Exchange Commission (SEC) within ten days after its ownership exceeds five per cent of the outstanding shares of the security. Section 14 (d) "is designed to insure informed shareholder decision making in the face of a *tender offer* by requiring that a *tender offeror* file a Schedule 14D-1 with the SEC and furnish to the target's shareholders all material information which it contains." *Mite Corp. v. Dixon,* 633 F.2d at 492-93. (Emphasis added.)

The first alleged conflict is between 15 U.S.C. § 78 n (d) (1) and RSA 421-A:3 (Supp. 1979). The State statute provides that "[n]o offeror shall make a takeover bid unless at least 20 days prior thereto he files with the commissioner and the target company a registration statement containing the information required by RSA 421-A:4 (Supp. 1979) and publicly discloses the material terms of the offer." The federal statute, on the other hand, requires disclosure of the information specified in 15 U.S.C. § 78 m (d) at the time a *tender offer* is made.

The commissioner properly answered this contention in his opinion:

> "The simple answer to Offeror's argument is that they are not conducting a tender offer and are under no . . . obligations [under 15 U.S.C. § 78n(d)(1)]. Thus as to their immediate conduct, no conflicting obligations are imposed by state and federal law. Indeed the absence of a conflict is evident from the fact that Offerors have made no filing under Rule 14 d-2 (b) [17 C.F.R. § 240.14d-2 (b)]. I need not consider in this case the argument that a conflict would be presented were Offerors proceeding via a tender offer."

See Esmark, Inc. v. Strode, No. 80-CA-1210-MR, slip op. at 5 (Ky. April 3, 1981).

The term "tender offer" has been defined as follows:

> "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders

> of a corporation to tender their shares for sale at a specified price. Cash or other securities may be offered to the shareholders as consideration; in either case, the consideration specified usually represents a premium over the current market price of the securities sought. This opportunity to tender shares at a premium remains open for only a limited period of time, often about two weeks."

Matter of City Investing Co., 411 N.E.2d 420, 427 (Ind. App. 1980) (quoting Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 12 50, 1251-52 (1973)). Based on this definition, we agree with the commissioner that there is no tender offer involved in this case.

The commissioner also properly ruled that there is no genuine conflict between the requirements of RSA 421-A:3 (Supp. 1979) and 15 U.S.C. § 78 m (d) (1) (Supp. 1980), which requires a public disclosure to be made ten days after the stock is acquired. The plaintiffs did not prove that it is physically impossible to meet both requirements. Furthermore, the defendants claim that the plaintiffs have conceded that they are "technically" able to comply with both requirements. There is no preemption merely because the State and Federal Acts contain different provisions. *See Florida Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-43.

We also sustain the commissioner's ruling that RSA 421-A:7 (Supp. 1979) does not conflict with stock exchange rules governing the type of open market transactions with which we are dealing in this case. RSA 421-A:7 (Supp. 1979) is entitled "Tender and Withdrawal of Shares." It deals with pro-ration of shares which have been *tendered* or *deposited* pursuant to a takeover offer. It also deals with the withdrawal of those shares, and its "best price" regulation requires that if there has been an increase in the price offered for shares before the expiration of the tender date, all the shareholders must receive the increased consideration.

RSA 421-A:2 VI (Supp. 1979) defines a takeover bid broadly enough to include all methods of acquisition, ranging from so-called open market transactions to formal "tender offers" addressed to shareholders. It is evident by its provisions, however, that section 7 of our act was not intended to apply to a takeover bid by open market transactions as is the case in this appeal. The legislative history of the Williams Act shows that it too "was passed with full awareness of the difference between tender offers and other forms of large scale stock accumulations." *Brascan Ltd. v. Edpe Equities Ltd.,* 477 F. Supp. 773, 790 (S.D.N.Y. 1979).

We have considered the history of the Securities Exchange Act of 1934 and especially section 28(a), 15 U.S.C. § 78bb (a), which explicitly recognized the role of the states in regulating securities transactions. We also note that the Williams Act has never expressly indicated an intent to preempt the securities field. The evidence of alleged conflicts between the provisions of the Williams Act and our Security Takeover Disclosure Act has failed to show an actual and significant frustration of federal purposes. *Kargman v. Sullivan,* 552 F.2d 2, 13 (1st Cir. 1977); *see Goldstein v. California,* 412 U.S. 546, 553 (1973).

Our act became effective March 25, 1977. It has not yet undergone significant shaping at the hands of the commissioner, to whom its administration has been delegated by the legislature. Nor is its language so unambiguous and inflexible as to leave no leeway for interpretation by the commissioner. His administrative interpretation is therefore entitled to deference. *N.H. Dept. of Rev. Administration v. Public Emp. Lab. Rel. Bd.,* 117 N.H. 976, 977-78, 380 A.2d 1085, 1086 (1977).

The United States Supreme Court will generally sanction State regulation that supplements federal efforts so long as compliance with the State law is not likely to significantly impede the purposes of the federal law. L. Tribe, American Constitutional Law § 6-24 at 379 (1978). An examination of the provisions of our Security Takeover Disclosure Act reveals that, like the Williams Act, it is concerned with the

protection of shareholders. The plaintiffs have failed to show that our act would produce in this case a direct and serious conflict with the clearly delineated federal purposes. We therefore hold that the commissioner properly ruled that our act is not preempted by the Williams Act.

III. The Commerce Clause

The test to determine the validity of a State statute under the commerce clause is as follows:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

A & P Tea Co. v. Cottrell, 424 U.S. 366, 371-72 (1976) (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)) (citations omitted); *Metropolitan Life Ins. Co. v. Whaland,* 119 N.H. 894, 904, 410 A.2d 635, 641 (1979).

RSA 421-A:3 (Supp. 1979) provides that no offeror shall make a takeover bid unless at least twenty days prior thereto he files a registration statement with the commissioner and the target company and publicly discloses the material terms of his offer.

The plaintiffs and amicus curiae argue that this twenty-day hiatus would disrupt the nation's securities markets by influencing price levels and discouraging trading and that this would be completely incompatible with long-established patterns of institutional trading. They also contend that protection of shareholders could be accomplished in another way. Furthermore, they maintain that the defendants have completely failed to justify the statute both in terms of local

benefits flowing from it and the unavailability of non-discriminatory alternatives adequate to protect the local interests at stake.

The commissioner pointed out in his opinion that under RSA 421-A:2 VI (a) (4) (Supp. 1979) any offeror may seek to be excused from registration if his offer is "not being made for the purpose of, and not having the effect of, changing or influencing the control of the issue. . . ." In that situation the commissioner may exempt the offeror from the definition of a "takeover bid." The burden of showing discrimination against commerce rests on the party challenging the validity of the statute, and if that burden is met, then the State must justify the constitutionality of the act. *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979).

The defendants maintain that the act regulates even-handedly since all offerors are treated alike. *See AMCA Intern. Corp. v. Krouse,* 482 F. Supp. 929, 938 (S.D. Ohio 1979). The act neither favors local investors nor insulates local citizens or business from interstate commerce. There is substantial evidence that the various state takeover statutes have not interfered with interstate commerce or worked to preclude an open market approach to takeover bids. Nor have these statutes deterred offerors from making tender offers or prevented target companies from being acquired. *Esmark, Inc. v. Strode,* No. 80-CA-121-MR, slip op. at 9-10 (Ky. April 3, 1981). That is especially true on the facts of this case.

The State of New Hampshire has a legitimate local interest in regulating takeover attempts involving a possible change of control of companies headquartered in this State who likely would have a disproportionately large percentage of stockholders located here. *See AMCA Intern. Corp. v. Krouse, supra* at 939. The Federal Constitution merely requires that the burdens on interstate commerce not be excessive. Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U. L. Rev. 872, 939 (1978). Furthermore, State regulations in this field which are "aimed at . . . fraudulent or otherwise unfair trade practices

. . . are less likely to be perceived as 'undue burdens on interstate commerce. . . .'" L. Tribe, American Constitutional Law § 6-12 (1978).

We hold that the plaintiffs have failed to sustain their burden of proving that RSA ch. 421-A (Supp. 1979) imposes a burden upon interstate commerce that is "clearly excessive in relation to the putative local benefits." *See Pike v. Bruce Church, Inc.*, 397 U.S. at 142; *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1036 (4th Cir. 1980).

Remanded.

DOUGLAS, BROCK and KING, *JJ.*, did not sit; LAMPRON, *J.*, retired supreme court justice, and GOODE and DICLERICO, *JJ.*, superior court justices, sat by special assignment under RSA 490:3.

PART B

Interlocutory Transfer Order
of the
Superior Court of New Hampshire,
Merrimack County

STATE OF NEW HAMPSHIRE

Merrimack, ss. April Term 1980

SUPERIOR COURT

_-80-_-_

SHARON STEEL CORPORATION
and
SUMMIT SYSTEMS, INC.,
Petitioners

–Against–

FRANK E. WHALAND, COMMISSIONER OF INSURANCE
Petitionee

Interlocutory Transfer Without Ruling of an Appeal From an Opinion of the Insurance Commissioner

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STATE OF NEW HAMPSHIRE

Merrimack, ss. April Term 1980

SUPERIOR COURT

-80-

SHARON STEEL CORPORATION

and

SUMMIT SYSTEMS, INC.,

Petitioners

Against

FRANK E. WHALAND, COMMISSIONER OF INSURANCE

Petitionee

INTERLOCUTORY TRANSFER STATEMENT

This is an interlocutory transfer statement pursuant to Supreme Court Rule 9 and Superior Court Rule 79 to transfer without ruling an appeal from the June 18, 1980 Opinion and Order (the "Opinion") of the Commissioner of Insurance, Frank E. Whaland (the "Commissioner") pursuant to Section 12 of the New Hampshire Security Takeover Disclosure Act, N.H. RSA ch. 421-A: 12 (Supp. 1979) (the "New Hampshire Takeover Act" or the "Act") concerning purchases of Nashua Corporation ("Nashua") common stock by Summit Systems, Inc. ("Summit"), a wholly-owned subsidiary of Sharon Steel Corporation ("Sharon").

This appeal raises two questions never considered by any federal or state court of last resort in the United States: (i) whether a state's takeover statute, such as the New Hampshire Takeover Act, which does not cover offers by or through broker dealers in the ordinary course of business without solicitation of orders to sell, applies to routine block transactions executed on national securities markets and (ii) whether the New Hampshire Takeover Act, as applied to Summit's open market block purchases of Nashua common

stock, is constitutional under the Supremacy Clause and Commerce Clause of the United States Constitution.

STATEMENT OF FACTS

1. Summit, a Delaware corporation whose principal business is investing in marketable securities, has its principal executive offices in Miami Beach, Florida 33141. Summit, a wholly-owned subsidiary of Sharon, owns 476,100 shares of the common stock of Nashua.

2. Sharon, whose principal business is the production and sale of basic steel mill products, is a Pennsylvania corporation with its principal place of business in Hubbard, Ohio 44425. It is subject to the informational filing and reporting requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, (the "Exchange Act"), and its common stock is registered with the Securities and Exchange Commission ("SEC").

3. NVF Company ("NVF"), Security Management Corporation ("SMC") and Victor Posner, a resident of Miami Beach, Florida, are related to Sharon. NVF, SMC and Mr. Posner have jointly challenged the Commissioner's jurisdiction over them, entered a special appearance at his hearings on April 23, 1980, and moved to extend their time to appeal from the Opinion until twenty days after a final determination of their jurisdictional motions in related proceedings.

4. Petitionee Frank E. Whaland is the Commissioner of Insurance (the "Commissioner") and is responsible for the administration and enforcement of the New Hampshire Takeover Act, N.H. RSA 421-A:9, 11.

5. Nashua, a multi-national corporation whose principal lines of business include office copy systems and supplies, photo finishing services, computer memory products, and adhesive products, is incorporated in Delaware and headquartered in Nashua, New Hampshire. In addition to its New Hampshire operations, Nashua has substantial facilities and properties located in nine states, the Commonwealth of Puerto Rico, and four foreign countries.

6. As of March 18, 1980, Nashua had 4,665,609 outstanding shares of common stock, which are traded on the New York and Toronto Stock Exchanges. As of July 31, 1979 less than ten percent of Nashua's stock was owned by New Hampshire residents. Nashua's stock is registered with the SEC and it is therefore subject to the informational filing requirements of the Exchange Act. The First National Bank of Boston, 100 Federal Street, Boston, Massachusetts 02110, is Nashua's transfer agent and registrar and records all Nashua common stock transactions.

7. In a series of nine separate open market block transactions executed by registered brokers on the New York Stock Exchange ("NYSE") or the Third Market (the over-the-counter market for listed securities) between October 11, 1979 and March 25, 1980, Summit purchased 476,100 shares, or 10.25 percent, of Nashua's common stock.

8. The transactions were executed by three brokers, Oppenheimer & Co., Inc. ("Oppenheimer") and Goldman, Sachs & Co. ("Goldman Sachs"), both from New York, and Jefferies & Co., Inc. ("Jefferies"), Atlanta, Georgia, in national securities markets outside New Hampshire. None of the six institutions which sold Nashua common stock to Summit is located in this State.

9. On November 26, 1979 pursuant to Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d), and Regulation 13D, 17 C.F.R. § 240.13d-1 (1979), Summit and Sharon filed with the SEC and sent to Nashua a Schedule 13D, the disclosure statement required of shareholders of 5 percent or more of any class of securities registered under the Exchange Act, reflecting Summit's purchases of Nashua common stock between October 11 and November 15, 1979.

10. Sharon issued a press release on November 26, 1979 noting that a 13D had been filed concerning Summit's purchases of Nashua common stock, summarizing its contents, and noting:

> Mr. Posner stated that the securities of Nashua were acquired and are being held as an investment. He noted

that Sharon Steel Corporation has no intention of participating in the formulation, determination or direction of the basic business decisions of Nashua.

On March 27, 1980 Sharon filed with the SEC and sent to Nashua an amended Schedule 13D reflecting its subsequent purchases of Nashua common stock. Sharon and Summit voted their proxy in favor of Nashua's proposed slate of directors at the April 25, 1980 annual meeting.

11. On April 2, 1980 Nashua filed with the Securities Division of the Commissioner a petition for a Cease and Desist Order (Exh. A) pursuant to Section 11 (I) of the New Hampshire Takeover Act, N.H. RSA ch. 421-A:11(I). Based upon Nashua's petition and unsworn statements made at an informal, *ex parte* hearing, Assistant Commissioner Kazan issued a Cease and Desist Order on April 3, 1980 (Exh. B) requiring the petitioners to discontinue purchasing Nashua common stock and file the registration statements required by Sections 3 and 4 of the New Hampshire Act.

12. On April 8, 1980, the Commissioner filed a petition for injunctive relief (Exh. C) alleging that Summit's purchases of Nashua stock constitute a "takeover bid" within the meaning of Section 2 (VI) of the New Hampshire Takeover Act. Following a hearing on April 23, 1980, the Merrimack County Superior Court granted the Commissioner's petition and issued a temporary injunction (Exh. D).

13. On April 23 and May 6, 1980 the Commissioner conducted hearings concerning Summit's purchases of Nashua common stock. Summit and Sharon appeared generally at the hearing before the Commissioner and introduced live testimony and affidavits to support their contentions that Summit's purchases of Nashua common stock are not governed by the New Hampshire Act and that the New Hampshire Act is unconstitutional under the Supremacy Clause and Commerce Clause of the United States Constitution. Nashua offered evidence concerning block trading practices in the nation's securities markets.

16. On June 18, 1980 the Commissioner issued his Opinion (Exh. F) which provides that his April 3, 1980 Cease and

Desist Order shall remain in effect. Noting that the evidence introduced by Sharon, Summit, and Nashua is not in conflict, the Opinion finds that:

(a) According to industry custom, broker-dealers effect open market block purchases on the New York Stock Exchange or the Third Market by the use of indications of their perceptions of their customers' potential interest in purchasing securities. Such methods of block trading were used by Summit's brokers, but it was not conclusively established that these indications of potential interest resulted in sales of any of the Nashua stock Summit bought; nevertheless, the Commissioner found that these practices amount to solicitation;

(b) Because the brokers' subsequent activities were a natural and foreseeable consequence of Summit's purchases, the so-called broker dealer exemption is not available to Summit and Sharon;

(c) The provisions of the New Hampshire Act relating to the timing of disclosure are not preempted by federal law on the same subject, Sections 13 and 14 of the Exchange Act, 15 U.S.C. §§ 78m, n, or the rules and regulations promulgated thereunder;

(d) The proration, best price, and withdrawal rights requirements of Section 7 of the New Hampshire Act apply only to those takeover bids subject to the New Hampshire Act which are formal tender offers and not to open market transactions, and consequently do not conflict with and are not preempted by Sections 6, 7, and 28 of the Exchange Act, 15 U.S.C. § § 78f, g, bb, and certain regulations promulgated thereunder governing prompt settlement of open market transactions, including Federal Reserve Board Regulation T, 12 C.F.R. § 220.1, *et seq.*, and NYSE Rule 64; and,

(e) The New Hampshire Act, as applied to open market block transactions executed on national securities markets by brokers outside New Hampshire, for

institutional customers located outside this State, does not impermissibly burden interstate commerce.

QUESTIONS PRESENTED

1. Does a broker's use of customary methods of effecting block transactions in the nation's securities markets amount to solicitation of offers to purchase under Section 2(VI)(a)(1) of the New Hampshire Takeover Act?

2. Are Sections 3 and 4 of the New Hampshire Takeover Act, which require that a registration statement be filed with the Commissioner twenty days prior to commencement of a takeover bid, if applied to Summit and Sharon's open market block purchases of Nashua common stock, preempted under the Supremacy Clause of the United Stated Constitution, Art. VI, § 1, by Sections 13, 14, and 28 of the Exhange Act, 15 U.S.C. §§ 78f, g, m, n, bb (1976), and certain rules and regulations promulgated thereunder?

3. Does the New Hampshire Takeover Act authorize the Commissioner to rule that Section 7 of the Act, which imposes proration, best price, and withdrawal requirements on takeover bids, does not apply to open market block purchases?

4. Is the Commissioner's ruling that Section 7 of the New Hampshire Act does not apply to open market block purchases binding on any persons who might proceed under the Act, such as Nashua and its shareholders?

5. Is Section 7 of the New Hampshire Takeover Act, if applied to Summit and Sharon's open market block purchases, in conflict with and preempted by Sections 6 and 7 of the Exchange Act, 15 U.S.C. § § 78f, g, bb, and certain regulations promulgated thereunder governing prompt settlement of open market transactions, including Federal Reserve Board Regulation T, 12 C.F.R. § 220.1, *et seq.*, and NYSE Rule 64?

6. Do Sections 3 through 7 inclusive and 11 of the New Hampshire Takeover Act, if applied to Sharon and Summit's open market block purchases of Nashua common stock, impose an impermissible burden on interstate commerce in

violation of the Commerce Clause of the United States Constitution, Art. I, § 8?

SUBSTANTIALITY OF LEGAL ISSUES

The legal issues raised by this appeal present vital questions of securities and constitutional law never addressed by the Supreme Court of this state or any federal or state court of last resort. This appeal is also the first opportunity any New Hampshire court has had to construe the applicability and constitutionality of the New Hampshire Takeover Act.

Accepting this interlocutory transfer without ruling would permit the Supreme Court to assess the constitutionality of the New Hampshire Takeover Act and its application to block transactions in the open market. Without a ruling by the Supreme Court, New Hampshire corporations, their shareholders, and actual and potential investors, cannot be certain of the Act's applicability or constitutionality.

In the past decade, thirty-six states have passed takeover laws. The New Hampshire Takeover Act, based in large part on the Council of State Governments Model Business Takeover Act (the "Model Act"), regulates significant transactions in the securities of target companies, defined by Section 2 of the Act as companies incorporated or headquartered in New Hampshire. Although the legislative history of New Hampshire's Act indicates it was not intended to "interfere with normal transactions in the stock of the target company," [1977] *N.H. House Journal* at 217 (vol. 1 March 24, 1977), the Commissioner's Opinion provides that the Act applies to Sharon and Summit's open market block purchases of Nashua common stock, which were made by brokers using their customary methods on the NYSE and the Third Market.

The legal questions presented by this appeal are novel: no court has construed any provision of the New Hampshire Takeover Act and the constitutional questions raised by this appeal have been hotly contested, with varying results, in state and federal courts throughout the nation evaluating takeover laws similar to New Hampshire's.

Should New Hampshire's Takeover Law Apply to Open Market Block Transactions?

Courts construing takeover laws similar to New Hampshire's have held open market block purchases by broker-dealers in the ordinary course of business to be outside the scope of the state statutes.* In the present case, the Commissioner ruled that Sharon and Summit's open market block purchases of Nashua common stock were accompanied by solicitation and therefore subject to the New Hampshire Takeover Act.

Is the New Hampshire Takeover Act Constitutional?

The constitutionality, under the Supremacy Clause and Commerce Clause of the United States Constitution, of state takeover laws has been widely disputed in recent years. Ten state and federal courts to consider the question have found state takeover laws similar to New Hampshire's unconstitutional.** Five courts have taken the opposite view.*** The

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* *Telvest Inc.* v. *Bradshaw,* [1979-80 Tr. Binder] Fed. Sec. L. Rptr. (CCH) ¶ 97,329 at 97,210 (4th Cir. 1980) (Virginia Act) (rendered moot on other grounds); *Chromalloy American Corp.* v. *Sun Chemical Corp.,* 483 F. Supp. 116, 118-119 (E.D. Mo. 1980) (Missouri Act); *Cutler-Hammer, Inc.* v. *Tyco Laboratories,* Cir. No. 78C221 (E.D. Wis. April 28, 1978) (Delaware and Wisconsin Acts); *UV Industries* v. *Sharon Steel Corp.,* [Current] Blue Sky L. Rptr. (CCH) ¶ 71,466 at 68,532 (Sup. Ct. N.Y. Cty. 1979) (New York Act); *UV Industries* v. *Sharon Steel Corp.,* Civ. 79-98-SD (D. Me. bench opinion of Gignoux, J., March 13, 1979) (Maine Act); *Financial General Bankshares, Inc.* v. *Lance,* [1978 Tr. Binder] Fed. Sec. L. Rptr. ¶ 96,403 at 93,430 (D.D.C. 1978) (Virginia Act). Copies of all unreported and unofficially reported opinions cited in this Statement are included in the accompanying Appendix.

** *Eure* v. *NVF Company,* 79 CVS 4093 (N.C. Super. Ct. Wake Cty. May 15, 1980) (North Carolina Act); *Eure* v. *Grand Metropolitan Ltd.,* 80-CVS-1685 (N.C. Super. Ct. Wake Cty. April 18, 1980) (same); *Great Western United Corp.* v. *Kidwell,* 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds,* 443 U.S. 173 (1979) (Idaho Act); *Kelley* v. *Beta X Corporation,* No. 79-23317-CZ (Mich. Cir. Ct. Ingham Cty. July 11, 1979) (Michigan Act); *Telco Marketing Services, Inc.* v. *Hospital Financial Corp.,* No. 79 C 2343 (N.D. Ill., June 11, 1979) (Illinois and Delaware Acts); *Brascan Ltd.* v. *Lassiter,* No. 79-

(Footnote continued on following page)

Commissioner's Opinion finds the New Hampshire Act to be constitutional.

Despite the profusion of lower court opinions no federal or state court of last resort has ruled on the constitutionality of a state takeover law. Absent a definitive ruling by this state's Supreme Court, potential target companies, offerors, and shareholders cannot be certain of the constitutionality of the New Hampshire Takeover Act.

Is New Hampshire's Takeover Law Preempted under the Supremacy Clause?

The Commissioner rejected Sharon and Summit's contention that Section 3 of the New Hampshire Act, which requires offerors to file a registration statement twenty days prior to commencing a takeover bid, is preempted by federal statutes governing the timing of disclosure in connection with open market purchases and tender offers.* Courts to consider this question have generally found the federal rule controlling. *Eure* v. *NVF Company, supra; Eure* v. *Grand*

1253 (E.D. La., May 3, 1979) (Louisiana Act); *Mite Corp.* v. *Dixon,* No. 79 C 200 (N.D. Ill., February 9, 1979), *appeal pending,* No. 79-1267 (7th Cir.) (Illinois Act); *Uarco, Inc.* v. *Daylin, Inc.,* No. 78 C 4246 (N.D. Ill., Nov. 27, 1978), *stay denied,* Nov. 29, 1978 (7th Cir.), *stay denied,* December 1, 1978 (Stevens, J.) (Illinois Act); *Dart Industries, Inc.* v. *Conrad,* 462 F. Supp. 1 (S.D. Ind. 1978), *stay denied,* December 1, 1978 (7th Cir.) (Delaware and Indiana Act). *See GM Sub Corp.* v. *Liggett Group, Inc.,* [1979-80 Tr. Binder] Fed. Sec. L. Rptr. ¶ 97,389 at 97,544-46 (Del. Sup. Ct. April 30, 1980) noting probable conflict between federal and Delaware law).

*** *Telvest, Inc.* v. *Bradshaw,* [Current] Fed Sec. L. Rptr. (CCH) § 97,329 (4th Cir. 1980) (Virginia Act upheld) (mootness questioned); *Strode* v. *Esmark, Inc.,* No. 79-CI-1590 (Ky. Cir. Ct. Franklin Cty., May 13, 1980) (upholding Kentucky Act); *Wylain, Inc.* v. *TRE Corp.,* 412 A.2d 338 (Del. Ch. 1980) (upholding Delaware Act); *Amca International* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979) (Ohio Act upheld); *City Investing* v. *Simcox,* 476 F. Supp 112 (S.D. Ind. 1979) (Indiana Act upheld).

* Recognizing the gravity of this problem, state legislatures or enforcement agencies in Wisconsin, New York, Indiana, Maryland, and Virginia have attempted to eliminate the conflict between their takeover statutes and SEC Rule 14d-2(b) by amending their statutes or regulations.

Metropolitan, Ltd., supra. See Amca International v. *Krouse, supra,* 482 F. Supp. at 933-34 n.4; *GM Sub Group* v. *Liggett Group, Inc., supra. But cf. Telvest, Inc.* v. *Bradshaw,* [1979-80 Tr. Binder] Fed. Sec. L. Rptr. (CCH) ¶ 97,329 (4th Cir. 1980), *mooted by* [1980] Va. Acts Assemb., ch. 216 (amends Virginia Act to permit offerors to satisfy the pre-purchase disclosure requirement of the Virginia Act by filing their federal Schedule 13D with Virginia's Corporation Commission).

Having found that Summit and Sharon's open market block purchases of Nashua stock are a takeover bid under the New Hampshire Act, the Commissioner held that Section 7 of the Act, which imposes proration, best price, and withdrawal rights on all takeover bids, does not apply to open market purchases. The Opinion provides no explanation of the Commissioner's authority to selectively apply portions of the Act and does not state whether this interpretation is binding on Nashua or its shareholders.

Nor does the Opinion reach the more fundamental question, whether Section 7 of the New Hampshire Act is preempted by federal regulations governing the prompt settlement of open market transactions, including Federal Reserve Board Regulation T, 12 C.F.R. § 220.1 *et seq.* (1979), and New York Stock Exchange Rule 64. *Compare Kennecott Copper Corp.* v. *Curtiss-Wright Corp.,* 594 F.2d 1195, 1207 (2d Cir. 1979) (impossible to impose proration, best price, and withdrawal requirements on open market purchases) and *Brascan Ltd.* v. *Edper Equities Ltd.,* 477 F. Supp. 773, 790-91 (S.D.N.Y. 1979) (same) *with Telvest, Inc.* v. *Bradshaw, supra* (Virginia statute not preempted by Regulation T).

The New Hampshire Act's Burden on Interstate Commerce

The Commissioner rejected Sharon and Summit's final constitutional argument, that Sections 3 through 7 and 11 of the New Hampshire Act impose an unconstitutional burden on interstate commerce. Similar state takeover laws have been declared unconstitutional for precisely the same reason. *Great Western United Corp.* v. *Kidwell, supra,* 577 F.2d at 1282 (Idaho Act); *Brascan Ltd.* v. *Lassiter, supra* (Louisiana Act);

Mite Corporation v. *Dixon* (Illinois Act), *supra*. *But see Strode* v. *Esmark, supra* (upholding Kentucky Act); *Wylain, Inc.* v. *TRE Corp., supra* (upholding Delaware Act).

Transfer of this Appeal Would Enhance the Administration of Justice

Accepting this transfer without ruling would permit this Court to promptly resolve an issue of immediate and substantial importance to the Insurance Commissioner, corporations headquartered in New Hampshire, their shareholders, and members of the investing public such as Sharon and Summit. This Court must inevitably confront the question of the New Hampshire Act's scope and constitutionality, either in a subsequent appeal in this or related proceedings or in a future action arising from a takeover bid made for a corporation subject to the New Hampshire Act. An increasing number of takeover bids may be subject to the new Hampshire Takeover Act in coming years. Federal securities filings made in the past two years indicate that eleven institutions have acquired more than five percent of the stock of ten companies headquartered or incorporated in New Hampshire.

A final determination by this Court concerning the Act's applicablility and constitutionality is in the interest of Nashua, the Insurance Commissioner, and the investing public. Nashua's interest in obtaining an interpretation of the Act was underscored both by its petition for a Cease and Desist Order and its subsequent intervention in the Commissioner's injunctive action in Merrimack County Superior Court, which placed in issue whether Sharon and Summit's open market purchases constituted a takeover bid subject to the Act.

The importance to Summit and Sharon, which have invested more than $11 million in Nashua common stock, of a prompt determination by this Court is equally apparent. Only a final determination by this Court will resolve whether Sharon and Summit's purchases are subject to the Act and permit them to reconcile their obligations under federal and New Hampshire securities laws.

An expedited review of this issue is equally important to the Commissioner, who in the coming months and years may repeatedly be confronted with questions concerning the Act's applicability and constitutionality. Granting this transfer will permit this Court to determine whether the Act can be constitutionally applied to open market block purchases and if the Commissioner can selectively apply portions of the Act to harmonize it with conflicting federal laws.

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/s/ William J. Cann
Presiding Justice

Dated: August 7, 1980

PART C

Opinion and Order

of the

New Hampshire Insurance Commissioner

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT
169 Manchester Street
Concord, N.H. 03301
603-271-2261

Frank E. Whaland
Commissioner

Mailing Address
Box 2005

IN THE MATTER OF A TAKEOVER BID PURSUANT TO CHAPTER 421-A OF THE NEW HAMPSHIRE REVISED STATUTES ANNOTATED INVOLVING:

SHARON STEEL CORPORATION
THOMAS ROAD, HUBBARD, OHIO 44425

SUMMIT SYSTEMS, INC.
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

NVF COMPANY
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

SECURITY MANAGEMENT CORPORATION
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

VICTOR POSNER
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

OFFERORS

and

NASHUA CORPORATION
44 FRANKLIN STREET, NASHUA, NEW HAMPSHIRE 03061

OFFEREE

OPINION AND ORDER

I. INTRODUCTION

A. *Summary of Proceedings*

On April 2, 1980, Nashua Corporation (the "Petitioner"), a Delaware corporation having its principal place of business in Nashua, New Hampshire, filed in this Department a "Petition for Cease and Desist Order." In this petition Nashua alleged that the above-named Offerors had, beginning in October 1979 and continuing throughout March 1980, acquired through several large-block transactions 476,100 shares of Nashua common stock, representing 10.252% of the outstanding common stock of the corporation. Petitioner alleged that the stock was acquired through "solicitation" and that the efforts of the Offerors amounted to a "takeover bid" as defined in New Hampshire RSA Ch. 421-A (the "Security Takeover Disclosure Act"). Petitioner further alleged that Offerors were in violation of RSA 421-A inasmuch as they had failed to file with either Nashua or the Insurance Department a "Registration Statement" as required by RSA 421-A:4, and no exemption from operation of the Chapter had been granted.

On the following day, April 3, 1980, I issued a cease and desist order against the Offerors. The Order was premised on the undisputed facts that Offerors had acquired more than 5% of the outstanding shares of Nashua common stock and had failed to file a registration statement in accordance with RSA 421-A:3. The Offerors were ordered:

> "to cease and desist from purchasing or offering to purchase, or in any way requiring or controlling the common stock of Nashua Corporation, pending compliance by Offerors with RSA 421-A, or until Offerors have filed with the Commissioner of Insurance an application for exempting or exclusion from the provisions of RSA 421-A and the Insurance Commissioner has ruled that the actions of Offerors either do not constitute a takeover bid under RSA 421-A:2:VI, or that the takeover bid is exempt from the operation of RSA 421-A."

On April 8, 1980, the Insurance Department filed a petition for injunctive relief in Merrimack County Superior Court. After hearings on April 23, 1980, the court (*Cann, J.*) issued a 60-day injunction enforcing the Department's cease and desist order.

On April 23, 1980, and May 6, 1980, the Department held hearings issues relating to whether the Offerors' acquisition of Nashua stock should be subject to the registration provisions of RSA 421-A. Several witnesses were heard and documentary evidence was received. This Opinion and Order contains my judgments on the factual and legal issues presented.

B. *Overview of Statute*

All the legal issues in this proceeding arise under RSA 421-A, New Hampshire's Security Takeover Disclosure Act.

The operative event with which the Act is concerned is the "takeover bid," defined as

> . . . the acquisition of, offer to acquire, or request of invitation for tenders of any equity security of a corporation . . . if after acquisition thereof the offeror would, directly or indirectly, be a record or beneficial owner of more than 5 percent of any class of the issued and outstanding equities of such corporation.

RSA 421-A:2(VI). The Act goes on to exclude from the definition of takeover bid various types of transactions which would otherwise be encompassed, including:

> (1) An offer by or through a broker-dealer in the ordinary course of his business without solicitation of orders to sell equity securities of the target company;
>
> . . .

If conduct by an offeror amounts to a "takeover bid," the statute requires that the offeror make a "financial disclosure" to both the target company and the Insurance Commissioner "at least 20 days prior" to making the bid. RSA 421-A:3.

Disclosure is to be made in a "registration statement" which shall include:

1) Copies of those materials by which the offeror proposes to disclose to offerees information material to a decision to accept or reject the offer;

2) Material background information on all persons on whose behalf the stock of the target company is being acquired;

3) The source and amount of funds or other consideration to be used in acquiring the target;

4) A statement of the offeror's plans upon acquisition;

5) Disclosure of the number of shares of the target owned by the offeror;

6) Details as to any contracts or other arrangements involving the offeror and the shares of the target;

7) Details as to any judicial or governmental proceedings in which the offer has been or is being challenged;

8) A recitation of the offeror's involvement in "tender offers" as defined under federal law;

9) A statement as to whether the offeror has previously been convicted of a felony or been subject to a judgment in the realms of anti-trust, fair employment, securities or environmental law;

10) Such other information as may be necessary to provide full, fair and effective disclosure to offerees.

RSA 421-A:4.

Once a registration statement is filed, it is the Commissioner's obligation to review the statement to insure that it provides adequate disclosure. To this end, public hearings may be scheduled. RSA 421-A:5. During this investigatory period, further efforts in behalf of the takeover bid are prohibited. RSA 421-A:6(I). If the Commissioner finds that adequate disclosure of the offer has been made, he must allow

the offer to proceed—notwithstanding any reservation he may have as to the merits of the offer. If he finds inadequate disclosure, he must prohibit the bid until the inadequacies have been remedied. RSA 421-A:6(II).

In addition to these provisions, the Act contains rules governing the tender and withdrawal of shares. These rules are designed to insure fair treatment of all shareholders when a tender offer is made. RSA 421-A:7. Also, the Act provides sanctions for fraudulent, deceptive or manipulative practices and for enforcement action in superior court by the Insurance Department and the parties at interest. RSA 421-A:8, :11. Persons who violate the Act are subject to criminal and civil penalties. RSA 421-A:13, :14.

C. *Points In Dispute*

The primary point in dispute in the proceedings before this Department is whether the activities of Offerors constitute a "takeover bid" within the meaning of RSA 421-A:2(VI). Offerors maintain that their purchases of Nashua stock are made through broker-dealers "in the ordinary course of . . . business without solicitation of orders to sell equity securities of the target company." They thus argue that their conduct is not encompassed within the definition of takeover bid. RSA 421-A:2(VI)(a)(1) (the "broker-dealer exemption"). Petitioner argues that in fact the Offerors have caused the solicitation of orders to sell.

The evidence on this dispute included testimony from the brokers involved in eight of the nine transactions by which Offerors acquired their present holdings of Nashua stock. Also, expert testimony was received on the general conduct of large-block trading. The evidence was essentially not in conflict and is described in Part III of this Opinion.

The legal difficulty lies in applying the evidence to the broker-dealer exemption. The real questions are:

1) What does "solicitation" mean in the context of the broker-dealer exemption, and

2) Does the undisputed conduct of the Offerors amount to such solicitation?

Aside from these questions, Offerors also present various arguments to the effect that the Security Takeover Disclosure Act is unconstitutional on its face and cannot be applied to their activities.

Specifically, they contend:

> 1) RSA 421-A is unconstitutional under the Supremacy Clause of the U.S. Constitution because the statute conflicts with Federal securities law and the rules of the New York Stock Exchange and is thus preempted;
>
> 2) RSA 421-A is unconstitutional under the Commerce Clause of the U.S. Constitution because the statute imposes an impermissible burden on interstate commerce.

These arguments are considered in Part IV of this Opinion.

II. The Meaning of Solicitation in the Broker-Dealer Exemption.

There is no dispute that Offerors' activities amount to a "takeover bid" as that term is preliminarily defined in RSA 421-A:2(VI). Offerors have acquired more than 5 percent of the outstanding stock of a corporation having its principal place of business within ths state. As noted previously, the issue drawn is whether Offerors' activity is nevertheless exempted as falling within the so-called broker-dealer exemption. Before consideration of the evidence on this issue, it is helpful to analyze in the abstract this exemption and attempt to determine its purpose in the regulatory scheme.

Initially, it should be noted that the central purpose of the statute is to provide advance disclosure to shareholders of the circumstances of those buyers of shares who may be acquiring control of the company. The ethical premise of the statute is thus that shareholders—who ordinarily buy and sell stock anonymously in market transactions—are entitled to a form of "notice" when a purchaser solicits not only their equity interest but also the element of "control." Two considerations of fairness underlie this ethical premise: First, that the selling price of shares that carry control will

normally reflect a premium for such control; and, second, that a shareholder before he decides to sell the element of control is entitled to disclosure as to who the new controlling authority will be.

The exemptions in 421-A:2(VI)(a) are not "exceptions" to the above considerations; rather, they reflect the proposition that the statute should not operate in circumstances where those considerations are of diminished or no importance. For example, exemption 6 applies to "any tender offer . . . to which the target company consents . . . if (its) board of directors has recommended acceptance thereof to shareholders and the terms thereof . . ." The implicit rationale of this exemption is that the board, since it acts in a fiduciary capacity, provides an adequate measure of protection for shareholders. Likewise, certain other exemptions apply only to transactions made in "good faith and not for the purpose of avoiding this chapter."

The broker-dealer exemption excludes from the operation of RSA 421-A offers "by or through a broker-dealer in the ordinary course of business without solicitation of orders to sell equity securities of the target company." There are two principal elements to this exemption: the buy order to the broker-dealer must constitute ordinary business dealing and it must not involve the solicitation of sell orders.

Clearly, this exemption encompasses the ordinary anonymous market transaction in which a purchase order and a sell order "meet" at the market. The orders are not causally related to each other and the transaction is consummated simply because, for whatever reasons, the buyer independent of the seller, and the seller independent of the buyer, have on that day met each other's needs. Why exempt such transactions from the operation of RSA 421-A? Clearly, it is becuase the buyer has purchased only stock which has already come to market—or, in any event, has come to market without his solicitation. Since the sell order is unsolicited by the buyer, no considerations of fairness dictate that the seller be on notice as to the buyer's intentions.

The situation is altered, of course, when the buyer or someone on his behalf has solicited the sell order. In these circumstances, the considerations of fairness which underlie the statute dictate "notice" and the exemption by its terms does not apply.

Of course, determining why a particular seller has chosen to bring his stock to market is problematic, even given open solicitation by a purchaser. The seller may be responding to such solicitation, but he may just as well be responding to personal circumstances apart from the soliciting. For this reason, application of the exemption does not depend on scrutiny of the seller's motivations. Rather, it is drawn in terms of the purchaser's conduct. If an offer is made with the solicitation of sell orders, it is not exempt, notwithstanding the fact that the solicitation efforts do not bear fruit.

III. Application of the Broker-Dealer Exemption in the Instant Case

A. *Evidence Regarding Purchases of Nashua Stock*

Offerors acquired their present position in Nashua Corporation through nine large-block transactions. The circumstances of each purchase were described in witness testimony or by affidavit.

The initial two purchases were made through broker Michael O'Brien of the securities firm of Oppenheimer & Company, Inc. The third through eighth purchases were made through broker Jerry Temple of the securities firm of Jefferies & Company, Inc. The ninth purchase was made through Robert E. Rubin, a general partner in the securities firm of Goldman, Sachs & Co.

The initial purchase, an acquisition of 85,800 shares, was made on October 11, 1979. Mr. O'Brien testified that an institution had called Oppenheimer on that day offering to sell the block, and that he had then called Offeror Posner, whom Mr. O'Brien was assigned to "cover." Upon discussing the merits of the stock with O'Brien, Posner decided to purchase. (The selling institution declined to furnish any

information with respect to the events precipitating its offer of sale.)

The second transaction was similar to the first. On October 16, 1979, an institution called Oppenheimer offering to sell a 10,000 share block of Nashua. Mr. O'Brien called Mr. Posner and a sale was consummated. (The selling institution declined to furnish any information with respect to the events precipitating the sale.)

In the third transaction, placed through Jefferies & Company on November 9, 1979, Mr. Posner acquired 125,000 shares of Nashua. The broker, Mr. Temple, testified that on November 8 an institution had indicated to Jefferies that it wished to sell a 230,000 share block of Nashua. Mr. Posner, who several days previous to November 9 had indicated to Mr. Temple a desire to *sell* a portion of his own holdings of Nashua, decided to purchase 125,000 shares after being informed by Jefferies that it had a "competing" seller. The institutional seller stated in an affidavit that its decision to sell was occasioned by a "desire to reduce risk and increase portfolio diversification."

The fourth transaction (81,100 shares on November 15, 1979), fifth transaction (19,100 shares on March 6, 1980), sixth transaction (7,000 shares on March 7, 1980), seventh transaction (95,000 on March 19, 1980) and eighth transaction (11,200 shares on March 24, 1980) are similar in circumstance. On each occasion Posner purchased stock from Jefferies & Company's "inventory" of sell orders. Affidavits of the institutional sellers in the fourth, fifth, sixth and eighth transactions indicated that the decision to sell was not occasioned by solicitation from a purchaser. (The selling institution in the seventh transaction declined to furnish any information with respect to the events precipitating the sale.)

The ninth transaction occurred on March 25, 1980 and involved 41,900 shares of Nashua. Broker Rubin stated by affidavit that he contacted Mr. Posner after receiving an unsolicited sell order from an institutional client. The institutional client stated by affidavit that its decision to sell was

occasioned "solely" by its assessment of the investment potential of Nashua.

Aside from this evidence as to specific transactions, considerable evidence was received as to broker conduct in general and the conduct of the specific brokers covering Mr. Posner (namely Mr. O'Brien and Mr. Temple).

Richard J. Fay, a general partner of the securities firm of Bear, Stearns & Company, testified on block trading in general. He stated the understanding in the securities that once a customer makes an initial large purchase in the stock of the company, the brokerage house will on behalf of that customer solicit further stock in the company, unless the customer expressly instructs that such further solicitation not take place.

Mr. Fay testified at length on the methods of such solicitation. One method is "AutEx," characterized by Fay as a "mechanical salesman." AutEx provides interconnecting video terminals among several hundred clients interested in large block trading. On these terminals a broker can display the fact that he has an interest in the sale or purchase of a small, medium or large block of the stock of a particular corporation. Subscribers to the service can then respond directly to the soliciting broker. Since any given solicitations displayed on the terminal are soon displaced by new solicitations, AutEx provides a recall function by which past solicitations are retrieved by the system and displayed. Thus, a broker desiring to sell a large block of stock can use AutEx to discover an institution which has in the past shown interest in that stock.

A second method used to solicit large block transactions is the daily "block list" of the brokerage house. As explained by Mr. Fay, the block list is a listing of buy and sell indications

> . . . which is compiled every night after the close of the market and updated at 8:45 in our office every morning with a meeting with the institutional salesmen and the national hookup whereby we will continually try and

> show any indications both on the buy or sell side for our clients.
>
> • • •
>
> That's our wares. It is like a garmenter going in with his bag of goods. They are the wares, the buy and sell orders.

The daily block list is distributed to all brokers in the firm and provides the basis for the brokerage house's solicitation of large blocks for that day.

These solicitation methods were clearly employed on behalf of Offeror Posner. After his initial purchases, Mr. Posner failed to instruct either Mr. O'Brien or Mr. Temple not to solicit additional shares. According to industry custom, such solicitation thus proceeded. Mr. O'Brien testified that after Mr. Posner's initial purchase,

> Oppenheimer & Company went out in the AutEx machine as an in-touch buyer, which means an institution that had any for sale they might come in to me and show it.

Similarly, Jefferies & Company solicited on AutEx.

Also introduced into evidence was a summary of Jefferies & Company daily block lists for Nashua Corporation for the months of November 1979 and March 1980. The summary showed that Offeror Summit Systems was an indicated buyer of Nashua stock on eleven occasions.

It was not conclusively established that any of these solicitation efforts actually resulted in sales of stock. But the fact of widespread brokerage solicitation initiated by the Offerors is undeniable.

Interestingly enough, while there was no conclusive evidence that any particular seller was motivated to sell by those solicitation efforts, there was evidence that the solicitation efforts led some sellers to approach Offerors' brokers. In the second block transaction Oppenheimer & Company was approached because the seller had noted that broker's prior efforts on AutEx. Mr. Temple, when asked why sellers

happened to contact Jefferies & Company, similarly stated that AutEx "let people know we were trading a heck of a lot of (Nashua) stock" and thus facilitated contact between the seller and Jefferies.

B. *Conclusion*

The evidence clearly shows that Offerors engaged in a course of conduct which had as its natural and forseeable consequence the solicitation of orders to sell Nashua common stock. Offerors cannot disclaim this solicitation. As persons familiar with the customs and practices of the securities industry, they knew or had reason to know that just such solicitation would take place.

It should be noted that there is nothing inefficient about this method of acquiring a substantial portion of a company. As Mr. Fay testified:

> Q. If I wanted to acquire . . . 500,000 shares in a company . . . —20 percent of the stock . . . —(but) was concerned for various reasons about telling my broker I specifically wanted to acquire 500,000 shares, if I called up my broker and made an initial purchase of 50,000 shares, I might be fairly confident in the future I would be getting calls back (providing additional purchase opportunities)?
>
> A. I would say that this is a very fair assumption.
>
> Q. And the customer who made the initial purchase . . . would be aware that (further solicitation) would likely go on in his behalf?
>
> A. . . . if he has any knowledge of the securities industry, the answer is yes, he would.

Neither is this method unsophisticated:

> There (are) two ways of doing this business. One is on a positive way of going out and buying up every possible share you can get. The other way is to react to blocks that come in, and if something looks attractive, you might end up with more stock than you might otherwise end up with.

(Testimony of Mr. O'Brien)

I conclude that Offerors are not entitled to the so-called broker-dealer exemption.

IV. Facial Constitutionality of RSA 421-A

Offerors argue that the Department's Cease and Desist order must in any event be withdrawn because RSA 421-A is itself violative on its face of various provisions of the United States Constitution. For reasons outlined below, I reject this argument.

A. *Argument That RSA 421-A Conflicts with SEC Rules On The Timing of Disclosure*

It should be noted at the outset that the New Hampshire Security Takeover Disclosure Act defines "takeover bid" broadly so as to include all manner of acquisitions from so-called open-market transactions to formal "tender offers" addressed to all shareholders. That certain large-block open market purchases are comprehended by the Act is evident from the limited scope of the broker-dealer exemption.

Offerors' initial constitutional argument is that RSA 421-A:3, providing that no takeover bid may commence until twenty days after the filing of the required disclosures, conflicts with SEC Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b), *as amended* 44 Fed. Reg. 70326 (Dec. 6, 1979). This SEC Rule requires that a *tender offer* under Section 14 of the Exchange Act, 15 U.S.C. § 78n, generally commence on the day it is publicly announced.

The simple answer to Offerors' argument is that they are not conducting a tender offer and are under no 14d-2(b) obligations. Thus, as to; their immediate conduct, no conflicting obligations are imposed by state and federal law. Indeed, the absence of a conflict is evident from the fact that Offerors have made no filing under Rule 14d-2(b). I need not consider in this case the argument that a conflict would be presented were Offerors proceeding via a tender offer.

Offerors contend that RSA 421-A:3 also conflicts with SEC Rule 13d-1, which provides that public disclosure of open market purchases above 5% of a company's equity

securities shall be made within 10 days after such acquisition.

Again, there is no genuine conflict. The New Hampshire statute simply provides for advance disclosure of acquisition plans or offers. Rule 13d-1 provides for subsequent public disclosure of actual purchases. Offerors have failed to demonstrate that such disclosure is in "conflict with the provisions of (federal securities law) or the rules and regulations thereunder." 15 U.S.C. § 78bb.

B. *Argument that the Proration, Best Price and Withdrawal Requirements of RSA 421-A:7 conflict with Stock Exchange Rules Governing Open Market Transactions.*

Offerors note that RSA 421-A:7 provides various rules governing the "tender and withdrawal of shares," the cumulative effect of which is to insure that all shareholders are treated equitably in a tender offer. Under these rules, the terms under which shares are initially tendered are automatically amended to reflect later changes in the tender offer and tendering shareholders have rights of withdrawal at any time up to five days before the announced termination date of the offer. Offerors demonstrate that these requirements are inconsistent with the open market rules of the security exchanges which obviously and necessarily demand immediate finality in transactions.

Again, Offerors misapprehend the operation of the New Hampshire statute. The Section 7 requirements govern when shares are tendered or "deposited" pursuant to a tender offer; they obviously can have no application to transactions effected through exchange markets. Section 7 of the Security Takeover Disclosure Act does not apply to open market transactions and thus the conflict posited by the Offerors is imagined.

No difficulty is occasioned by the fact that the statutorily required "financial disclosure" (RSA 421-A:4) comprehends not only formal tender offers but also open market acquisitions. To the extent the acquisition involves formal materials and set terms, those matters must be disclosed. If there

are no such materials and the terms are fluid, the Offeror need only so state. The statutory requirement is simply that the Offeror disclose the circumstances of his offer, whatever those circumstances may be.

C. *Argument That RSA 421-A Imposes An Impermissible Burden on Interstate Commerce*

I find no merit to Offerors' arguments on this point. New Hampshire has a strong local interest in insuring that the takeover of companies intimately involved in this State is accompanied by fair disclosure. The New Hampshire statute requires only that the acquiring party provide such disclosure. As applied to open market transactions, the statute does not conflict with any federal statute or regulation, or impermissibly burden the operation of national security markets.

I further note that under exemption 4 (RSA 421-A:2 (VI) (a) (4)) any offeror may seek to be excused from registration if his offer is "not being made for the purpose of, and not having the effect of, changing or influencing the control of the issuer."

I conclude that RSA 421-A is not invalidated by the Commerce Clause.

V. ORDER

Offerors have not complied with the registration provisions of RSA 421-A, nor has any exemption or exclusion from the act been approve. My cease and desist order of April 3, 1980, thus remains in effect.

FRANK E. WHALAND
Commissioner of Insurance

Dated: June 18, 1980

PART D

Cease and Desist Order
of the
New Hampshire Insurance Commissioner

THE STATE OF NEW HAMPSHIRE

Frank E. Whaland
Commissioner

Mailing Address
Box 2005

INSURANCE DEPARTMENT
169 Manchester Street
Concord, N. H. 03301
603-271-2261

IN THE MATTER OF A TAKEOVER BID PURSUANT TO CHAPTER 421-A OF THE NEW HAMPSHIRE REVISED STATUTES ANNOTATED INVOLVING:

SHARON STEEL CORPORATION
THOMAS ROAD, HUBBARD, OHIO 44425

SUMMIT SYSTEMS, INC.
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

NVF COMPANY
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

SECURITY MANAGEMENT CORPORATION
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

VICTOR POSNER
6917 COLLINS AVENUE, MIAMI BEACH, FLORIDA 33141

OFFERORS

and

NASHUA CORPORATION
44 FRANKLIN STREET, NASHUA, NEW HAMPSHIRE 03061

OFFEREE

CEASE AND DESIST ORDER

WHEREAS, it appears to the Commissioner of Insurance of the State of New Hampshire that the aforenamed OFFERORS have engaged in acts and practices constituting a violation of Chapter 421-A of the Revised Statutes Annotated of New Hampshire), namely, the

1. Acquisition of more than 5% of the outstanding shares of the common stock of Nashua Corporation, (which has its principal executive office in Nashua, New Hampshire), and

2. The failure of said OFFERORS to file a registration statement in accordance with RSA 421-A:3,

NOW THEREFORE, pursuant to RSA 421-A:11, said OFFERORS, and each of them, are hereby ordered to cease and desist from purchasing or offering to purchase, or in any way acquiring or controlling the common stock of Nashua Corporation, pending compliance by OFFERORS with RSA 421-A, or until OFFERORS have filed with the Commissioner of Insurance an application for exemption or exclusion from the provisions of RSA 421-A and the Insurance Commissioner has ruled that the actions of OFFERORS either do not constitute a takeover bid under 421-A:2:VI, or that the takeover bid is exempt from the operation of RSA 421-A.

Dated this 3rd day of April, 1980.

FRANCIS E. WHALAND
Insurance Commissioner

By: /s/

James B. Kazan
Assistant Insurance Commissioner

PART E

Notice of Appeal to the United States Supreme Court

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

1981 Term
September Session
No. 80-333

SHARON STEEL CORPORATION

and

SUMMIT SYSTEMS, INC.,

Plaintiffs,

–Against–

FRANK E. WHALAND, COMMISSIONER OF INSURANCE,

Defendant,

and

NASHUA CORPORATION,

Intervenor.

ON APPEAL FROM MERRIMACK COUNTY SUPERIOR COURT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that plaintiffs Sharon Steel Corporation and Summit Systems, Inc. hereby appeal to the Supreme Court of the United States from the per curiam opinion and final judgment of the Supreme Court of the State of New Hampshire dated July 2, 1981, affirming the June 15, 1980 decision of Frank E. Whaland, the Commissioner of Insurance.

This appeal is taken under 28 U.S.C. § 1257(2).

DATED: September 22, 1981

Respectfully submitted,

SHARON STEEL CORPORATION,
SUMMIT SYSTEMS, INC.

By their attorneys,
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Professional Association
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(603) 669-1000

By /s/
A Member of the Firm

Joseph A. Millimet
E. Donald Dufresne
Lee C. Nyquist

Of Counsel:

SHEARMAN & STERLING
53 Wall Street
New York, New York 10005
(212) 483-1000

CERTIFICATE OF SERVICE

I hereby certify that true copies of the Plaintiffs' Sharon Steel Corporation and Summit Systems, Inc. Notice of Appeal to the Supreme Court of the United States was served by first class mail on the following counsel for defendant, intervenors, and amicus on September 22, 1981:

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Commission

Dated: September 22, 1981.

Respectfully submitted,

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SUMMIT SYSTEMS, INC.

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PART F
Securities Exchange Act of 1934
§ 13(d), 15 U.S.C. § 78m(d)

(d) *Reports by persons acquiring more than five per centum of certain classes of securities*

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*]; is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected:

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests,

the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933 [15 U.S.C. 77a *et seq.*];

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

PART G

New Hampshire Security Takeover Disclosure Act, N.H. Rev. Stat. Ann. ch. 421-A (Supp. 1979)

421-A:1 Short Title. This chapter shall be known as the Security Takeover Disclosure Act.

421-A:2 Definitions. In this chapter:

I. "Commissioner" means the insurance commissioner as defined in RSA 421.

II. "Equity security" means any stock, bond, or other obligation of a corporation, the holder of which has the right to vote on any matter by virtue of the articles of incorporation, by-laws or governing instrument of such corporation or for the election of members of the board of directors of such corporation. Equity security includes any security convertible into equity security, and also includes any right, option or warrant to purchase an equity security.

III. "Offeree" means the beneficial or record owner of securities which an offeror acquires or offers to acquire in connection with a takeover bid.

IV. "Offeror" means a person who makes, or in any way participates or aids in making a takeover bid, and includes persons acting jointly or in concert, or who intend to exercise jointly or in concert any voting rights attached to the securities for which such takeover bid is made. An "offeror" does not include any bank, broker-dealer, attorney, accountant or consultant furnishing information or advice to an offeror and not otherwise participating in the takeover bid.

V. "Person" means an individual, corporation, association, partnership, trust or other entity.

VI. "Takeover bid" means the acquisition of, offer to acquire, or request of invitation for tenders of any equity security of a corporation organized under the laws of this state or having its principal place of business within this state or having its principal executive office within this state, if after acquisition thereof the offeror would, directly or

indirectly, be a record or beneficial owner of more than 5 percent of any class of the issued and outstanding equity securities of such corporation.

(a) "Takeover bid" does not include:

(1) An offer by or through a broker-dealer in the ordinary course of his business without solicitation of orders to sell equity securities of the target company;

(2) An offer to acquire such equity security solely in exchange for other securities, or the acquisition of such equity security pursuant to such offer, for the sole account of the offeror, in good faith and not for the purpose of avoiding this chapter, and not involving any public offering of such other securities within the meaning of section 4 of title one of the "Securities Act of 1933" (48 Stat. 77, 15 U.S.C. 77D(2)), as amended;

(3) Any other offer to acquire an equity security, or the acquisition of such equity security pursuant to such offer, for the sole account of the offeror, from not more than 25 persons, in good faith and not for the purpose of avoiding this chapter;

(4) Any offer or class of offer which the commissioner, by regulation or order, shall exempt from the definition of "takeover bid" as not being made for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the scope of this chapter;

(5) An offer, if the acquisition by the offeror, in the instant transaction and in all acquisitions of equity securities of the same class during the preceding 12 months, does not exceed 2 percent of that class of outstanding equity securities of the target company;

(6) Any tender offer or request or invitation for tenders to which the target company consents, by action of its board of directors, if such board of directors has recommended acceptance thereof to shareholders and the terms thereof, including any

inducements to officers or directors which are not made available to all shareholders, have been furnished to shareholders.

VII. "Target company" means a corporation whose securities are or are to be the subject of a takeover bid.

421-A:3 Requirement of Financial Disclosure. No offeror shall make a takeover bid unless at least 20 days prior thereto he files with the commissioner and the target company a registration statement containing the information required by RSA 421-A:4 and publicly discloses the material terms of the offer. The registration statement filed with the commissioner shall be accompanied by such fees as may be prescribed under RSA 421-A:9.

421-A:4 Contents of Registration Statement. The registration statement required to be filed pursuant to RSA 421-A:3 shall include:

I. Copies of all prospectuses, brochures, advertisements, circulars, letters or other matter by means of which the offeror proposes to disclose to offerees all information material to a decision to accept or reject the offer.

II. The identity and material background information of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected, including, but not limited to:

(a) if the offeror is a corporation, complete information on the organization and operations of offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, a description of each class of the offeror's capital stock and of its long term debt, audited balance sheets and income statements for each of the 3 most recent fiscal years and, if the most recent balance sheet and income statement are for a period ending more than 90 days prior to the date of filing, an interim balance sheet and income statement covering the period from the date of the last audited balance sheet and income statement filed hereunder to a date within 90 days of the date of filing, a brief description of the location and general

character of the principal physical properties of the offeror and its subsidiaries, a description of pending legal proceedings, other than routine litigation, to which the offeror or any of its subsidiaries is a party or of which any of their property is the subject, a brief description of the business done and projected by the offeror and its subsidiaries and the general development of such business over the past 5 years, the names of all directors and executive officers together with biographical summaries of each for the preceding 5 years, to date, and the approximate amount of any material interest, direct or indirect, of any of the directors or officers in any material transaction during the past 3 years, or in any proposed material transactions to which the offeror or any of its subsidiaries was or is to be a party;

(b) if the offeror is not a corporation, information concerning the background of the person, including his material business activities and affiliations during the past 3 years, and a description of any material pending legal or administrative proceeding in which he is a party;

III. The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities, other than the existing capital stock or long term debt of the offeror, which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the material terms of any financing arrangements and the names of the parties from whom the funds were borrowed;

IV. A statement of any plans or proposals which the offeror, upon gaining control, may have to liquidate the target company, sell its assets, effect a merger or consolidation of it, or make any other major change in its business, corporate structure, management personnel, or policies of employment;

V. The number of shares of any equity security of the target company of which each offeror is beneficial or record owner or has a right to acquire, directly or indirectly,

together with the name and address of each person defined in this chapter as an offeror;

VI. Particulars as to any contracts, arrangements or understandings to which an offeror is party with respect to any equity security of the target company, including, without limitation, transfers of any equity security, joint ventures, loans or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into;

VII. A description of any court or governmental proceeding in which the offer has been disapproved or enjoined and of any pending court or governmental proceeding in which it is alleged that the offer does not comply with the provisions of the applicable laws or regulations;

VIII. A statement of which other tender offers, subject to section 13, clause (d) or proxy contests subject to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78a, et seq.), as amended, the offeror has engaged in within 5 years prior to the offer;

IX. A statement of whether any officer or director of the offeror or the offeror has:

(a) been convicted within the prior 10 years of a felony, or

(b) been subject of a judgment or decree entered by a court or governmental agency with respect to laws relating to:

(1) anti-trust,

(2) fair employment practices,

(3) purchase or sale of securities, or

(4) environmental protection; and

X. Such other and further documents, exhibits, data, and information as may be required by regulations of the

commissioner or as may be necessary to make fair, full, and effective disclosure to offerees of all information material to a decision to accept or reject the offer. If any material change occurs in the facts set forth in the registration statement required by RSA 421-A:3, the offeror who filed such statement shall promptly notify the commissioner and the target company of such change and shall amend the registration statement to reflect such change within 10 days of the change.

421-A: 5 Scheduling of Public Hearing. Within 20 days after the filing of a registration statement pursuant to this chapter, the commissioner shall order a hearing, if he determines it necessary or appropriate for the protection of offerees in this state, or, if so requested by the target company, within 15 days following such filing. If no such hearing is ordered within said 20 days or a hearing is so ordered within such time and after hearing the commissioner adjudicates that the takeover bid is not in violation of this chapter and that effective provisions are made for fair and full disclosure to the offerees of all information material to a decision to accept or reject the offer, the takeover bid may be made. If the commissioner finds that the takeover bid, if amended in certain respects, would comply with the provisions of this chapter, the takeover bid may be made only if so amended. Any initial hearing shall commence within 60 days after the filing of a registration statement.

421-A:6 Prohibition of Takeover Bid.

I. In the event the commissioner shall schedule a public hearing or hearings or otherwise conduct an investigation pursuant to RSA 421-A:5, the commissioner shall issue an order prohibiting an offeror from making or continuing with any takeover bid. Every person shall comply with every such order.

II. Within 60 days after the completion of a hearing or hearings held pursuant to RSA 421-A:5 or the conclusion of his investigation conducted pursuant to such section, the commissioner shall determine whether the requirements of

this chapter have been met, and shall issue an order containing his conclusions and the reasons therefor. If the requirements of this chapter have been met, such order shall authorize the making of continuation of the takeover bid. If the commissioner finds the requirements of this chapter have not been met, he shall by order prohibit the making or continuation of any takeover bid until such time as full compliance has been accomplished.

421-A:7 Tender and Withdrawal of Shares.

I. Securities deposited pursuant to a takeover bid may be withdrawn by an offeree or his attorney-in-fact by demand in writing to the offeror or the depository at any time up to 5 days prior to the announced termination date of the offer.

II. If an offeror makes a takeover offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto is greater than the number the offeror has offered to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

III. If an offeror varies the term of a takeover offer before its expiration date by increasing the consideration offered to the offerees, the offeror shall pay the increased consideration for all equity securities accepted, whether the securities have been accepted by the offeror before or after the variation in the terms of the offer.

IV. An offeror may not make a takeover offer involving a target company which is not made to the holders of equity securities of the target company residing in the state on the same terms as such takeover offer is made to holders of such securities not residing within this state.

421-A:8 Fraudulent, Deceptive or Manipulative Practices.

I. No person shall make any untrue statement of a material fact or fail to state any material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading, nor

engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. Fraudulent, deceptive or manipulative acts or practices include without limitation those acts and practices prescribed by rules and regulations which the commissioner is hereby empowered to promulgate, adopt, amend and rescind as is necessary to carry out the provisions of this chapter.

II. No takeover bid shall be made unless this chapter has been complied with, and no offeror shall make a takeover offer until any administrative or injunctive proceeding brought by the commissioner against the offeror for violation of this chapter has been finally adjudicated.

421-A:9 Administration.

I. This chapter shall be administered by the insurance commissioner and employees designated by him within the department. The insurance commissioner is hereby empowered to promulgate, alter, amend or revoke rules and regulations necessary to carry out the purposes of this chapter.

II. The insurance commissioner may establish fees for the filing of any registration statement, not to exceed $2,500 to recover the costs of administering this chapter. Such fees may vary according to the maximum consideration payable by the offeror for the securities which are the subject of the takeover bid.

421-A:10 Designation of Secretary of State for Service.

I. Every nonresident offeror, except a foreign corporation which has appointed and keeps a resident agent in this state, shall be deemed to have appointed the secretary of state as his agent upon whom may be served any lawful process, authorized by this chapter, with the same effect as though served upon the offeror personally.

II. Service of process pursuant to this section shall be accomplished by leaving a copy of the process in the office of the secretary of state, but it shall not be effective unless notice of the service and a copy of the process is sent by registered mail to the nonresident offeror served, at his last known address.

421-A:11 Enforcement.

I. Whenever it appears to the commissioner that any person has engaged in or is about to engage in any act or practice constituting a violation of this chapter, or any rule or order promulgated or issued hereunder, the commissioner may issue and cause to be served upon any person violating any of the provisions of this chapter, an order requiring the person to cease and desist therefrom; and the commissioner may bring an action in a court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order promulgated or issued hereunder, or he may refer the matter to the attorney general or the county attorney of the appropriate county. Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order and may order rescission of any sales or purchases of securities determined to be unlawful under this chapter, or any rule or order promulgated or issued hereunder. The court may not require the commissioner to post a bond.

II. In any court proceedings, the commissioner may apply for and, on due showing, be entitled to have issued the court's subpoena requiring the appearance of any defendant and his employees or agents and the production of documents, books and records as may appear necessary for the hearing of the petition, and to testify and give evidence concerning the acts, conduct or things complained of in the action.

III. Whenever it appears that any person has engaged in or is about to engage in any act or practice constituting a violation of this chapter or any rule or order promulgated or issued hereunder, the offeror, target company or any record

or beneficial owner of an equity security of the target company may bring an action in a court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with the chapter or any rule or order promulgated or issued hereunder. Upon a proper showing, the court may grant a permanent or preliminary injunction or temporary restraining order or may order rescission of any sales, tenders for sale, purchases or tenders for purchase of equity securities determined to be unlawful under this chapter or any regulation or order of the commissioner.

421-A:12 Appeal to Superior Court.

I. Any party aggrieved by a decision or final order of the commissioner under RSA 421-A:6 or RSA 421-A:11 may appeal to the superior court by filing a petition within 20 days of the date of said decision or order, setting forth that such decision is illegal, unjust or unreasonable, in whole or in part, and specifying the grounds upon which the same is claimed to be illegal, unjust or unreasonable. A copy of such petition shall be served on the commissioner.

II. Upon the filing of an appeal, the commissioner shall transfer to the court the record of the proceeding before him and all papers on file in his office relating to or affecting such decision or order, or a certified copy thereof. The appeal shall be given precedence over other matters then pending in the court. The scope of review by the superior court shall be limited to questions of law. After hearing and upon consideration of the record, the court may affirm, vacate or modify, in whole or in part, the decision of the commissioner, or may remand the same to the commissioner for further findings. In the absence of a seasonable appeal, said decision and order shall be final.

III. An appeal does not suspend the operation of the order or decision from which the appeal is taken during the pendency of the appeal unless so ordered by the court. An appeal may be taken from the judjment of the court on any appeal as an appeal is otherwise taken in civil actions.

421-A:13 Criminal Penalties.

I. Any person who violates RSA 421-A:3 or any rule promulgated thereunder, or any order of which he has notice, or who willfully violates RSA 421-A: 7, 8 or 11 or any rule or order promulgated or issued thereunder, shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned more than 6 years after the alleged violation.

II. The commissioner may refer such evidence as is available concerning violations of this chapter or of any rule or order promulgated or issued hereunder to the attorney general or the county attorney of the appropriate county who may, with or without any reference, institute the appropriate criminal proceedings under this chapter. If referred to a county attorney, he shall within 90 days file with the commissioner a statement concerning any action taken or, if no action has been taken, the reasons therefor.

III. Nothing in this chapter shall be construed to limit the power of the state to punish any person for any conduct which constitutes a crime under any other statute.

421-A:14 Civil Liability of Offeror for Violations.

I. Any offeror who purchases a security in connection with a takeover offer in violation of this chapter shall be liable to the person selling the security to him, who may sue either at law or in equity. In an action for rescission the seller shall be entitled to recover the security, plus any income received by the purchases thereon, upon tender of the consideration received. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable. Damages shall be the amount by which either the value of the security on the date of purchase or its present value, whichever is greater, exceeds the present value of the consideration received for the security.

II. Every person who directly or indirectly controls a person liable under paragraph I of this section, every partner, principal executive officer or director of such person, every person occupying a similar status of performing similar functions, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, is also liable jointly or severally with and to the same extent as such person, unless the person who would otherwise be so liable proves that he did not know, and, in the exercise of reasonable care, could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There shall be contribution, as in cases of contract, among the several persons so liable.

III. No action may be maintained under paragraph I of this section unless commenced before the expiration of 3 years after the act or transaction constituting the violation or the expiration of one year after the discovery of the facts constituting the violation, whichever first expires.

IV. The rights and remedies under this chapter are in addition to any other rights or remedies that may exist at law or in equity.

421-A:15 Exclusions. This chapter shall not apply when:

I. The offeror or the target company is a public utility or a public utility holding company as defined in section 2 of the "Public Utility Holding Company Act of 1935" (49 Stat. 803, 15 U.S.C. 79), as amended, and the takeover bid is subject to approval by the appropriate federal agency as provided in said act;

II. The offeror or the target company is a bank or a bank holding company subject to the "Bank Holding Company Act of 1956" (70 Stat. 133, 12 U.S.C. 1841), and subsequent amendments thereto, and the takeover bid is subject to approval by the appropriate federal agency as provided in said act;

III. The offeror or the target company is a savings and loan holding company as defined in section 2 of the "Savings and Loan Holding Company Amendments of 1967 "(82 Stat. 5, 12 U.S.C. 1730A), as amended, and the takeover bid is subject to approval by the appropriate federal agency as provided in said amendments;

IV. The offeror and the target company are banks and the offer is part of a merger transaction subject to approval by appropriate federal supervisory authorities.

PART H
SEC Rule 13d-1,
17 C.F.R. § 240.13d-1

§ 240.13d-1: Filing of Schedules 13D and 13G.

(a) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (d) of this section, is directly or indirectly the beneficial owner of more than 5 percent of such class shall, within 10 days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, and to each exchange where the security is traded, and file with the Commission, a statement containing the information required by Schedule 13D (§ 240.13d-101). Six copies of the statement, including all exhibits, shall be filed with the Commission.

(b)(1) A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Schedule 13D may, in lieu thereof, file with the Commission, within 45 days after the end of the calendar year in which such person became so obligated, six copies, including all exhibits, of a short form statement on Schedule 13G and send one copy each of such schedule to the issuer of the security at its principal executive office, by registered or certified mail, and to the principal national securities exchange where the security is traded: *Provided,* That it shall not be necessary to file a Schedule 13G unless the percentage of the class of equity security specified in paragraph (d) of this section beneficially owned as of the end of the calendar year is more than 5 percent: *And provided further,* That:

(i) Such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect,

including any transaction subject to Rule 13d-3(b) (§ 240.13d-3(b)); and

(ii) Such person is:

(A) A broker or dealer registered under section 15 of the Act;

(B) A bank as defined in section 3(a)(6) of the Act;

(C) An insurance company as defined in section 3(a)(19) of the Act;

(D) An investment company registered under section 8 of the Investment Company Act of 1940;

(E) An investment adviser registered under section 203 of the Investment Advisers Act of 1940;

(F) An employee benefit plan, or pension fund which is subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") or an endowment fund;

(G) A parent holding company, provided that: (*1*) The Schedule 13G is being used to report the indirect acquisition of the beneficial ownership of securities acquired by a subsidiary; and (*2*) such subsidiary is a person specified in Rule 13d-1(b)(1)(ii) (§ 240.13d-1(b)(1)(ii)) except that the inclusion in the reported holdings of not more than one percent of a class beneficially owned by a subsidiary that is not so specified will not prevent the use of Schedule 13G, so long as the information called for by Schedule 13D is furnished in the parent's Schedule 13G with respect to the securities of such subsidiary;

(H) A group, provided that all the members are persons specified in Rule 13d-1(b)(1)(ii)(A) through (G); and

(iii) Such person has promptly notified any other person (or group within the meaning of section 13(d)(3) of the Act) on whose behalf it holds, on a discretionary basis, securities exceeding five percent of the class, of any acquisition or transaction on behalf of such other

person which might be reportable by that person under Section 13(d) of the Act. This paragraph only requires notice to the account owner of information which the filing person reasonably should be expected to know and which would advise the account owner of an obligation he may have to file a statement pursuant to section 13(d) of the Act or an amendment thereto.

(2) Any person relying on Rules 13d-1(b)(1) and 13d-2(b) shall, in addition to filing any statements required thereunder, file a statement on Schedule 13G, within ten days after the end of the first month in which such person's direct or indirect beneficial ownership exceeds ten percent of a class of equity securities specified in Rule 13d-1(c) computed as of the last day of the month, and thereafter within ten days after the end of any month in which such person's beneficial ownership of securities of such class, computed as of the last day of the month, increases or decreases by more than five percent of such class of equity securities. Six copies of such statement, including all exhibits, shall be filed with the Commission and one each sent, by registered or certified mail, to the Issuer of the security at its principal executive office and to the principal national securities exchange where the security is traded. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (b)(2) of this section unless the person thereafter becomes the beneficial owner of more than ten percent of the class and is required to file pursuant to this provision.

(3)(i) Notwithstanding paragraphs (b)(1) and (2) of this section and Rule 13d-2(b) (§ 240.13d-2(b)), a person shall immediately become subject to Rules 13d-1(a) and 13d-2(a) and shall promptly, but not more than 10 days later, file a statement on Schedule 13D if such person:

(A) Has reported that it is the beneficial owner of more than five percent of a class of equity securities in a statement on Schedule 13G pursuant to paragraph (b)(1) or (b)(2) of this section, or is required to report such acquisition but has not yet filed the schedule;

(B) Determines that it no longer has acquired or holds such securities in the ordinary course of business or not with the purpose nor with the effect of changing or influencing the control of the Issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b) (§ 240.13d-3(b)); and

(C) Is at that time the beneficial owner of more than five percent of a class of equity securities described in Rule 13d-1(c).

(ii) For the ten day period immediately following the date of the filing of a Schedule 13D pursuant to this paragraph (b)(3), such person shall not: (A) Vote or direct the voting of the securities described in paragraph (b)(3)(i)(A); nor, (B) Acquire an additional beneficial ownership interest in any equity securities of the issuer of such securities, nor of any person controlling such issuer.

(4) Any person who has reported an acquisition of securities in a statement on Schedule 13G pursuant to paragraph (b)(1) or (b)(2) of this section and thereafter ceases to be a person specified in paragraph (b)(1)(ii) of this section shall immediately become subject to Rules 13d-1(a) and 13d-2(a) and shall file, within ten days thereafter, a statement on Schedule 13D, in the event such person is a beneficial owner at that time of more than five percent of the class of equity securities.

(c) Any person who, as of December 31, 1978, or as of the end of any calendar year thereafter, is directly or indirectly the beneficial owner of more than 5 percent of any equity security of a class specified in paragraph (d) of this section and who is not required to file a statement under paragraph (a) of this section by virtue of the exemption provided by section 13(d)(6)(A) or (A) of the Act, or because such beneficial ownership was acquired prior to December 22, 1970, or because such person otherwise (except for the exemption provided by section 13(d)(6)(c) of the Act) is not required to file such statement, shall, within 45 days after the end of the calendar year in which such person became obligated to

report under this paragraph, send to the issuer of the security at its principal executive office, by registered or certified mail, and file with the Commission a statement containing the information required by Schedule 13G (§ 240.13d-102). Six copies of the statement, including all exhibits, shall be filed with the Commission.

(d) For the purpose of this regulation, the term "equity security" means any equity security of a class which is registered pursuant to section 12 of that Act, or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940; *Provided,* Such term shall not include securities of a class of non-voting securities.

(e) For the purpose of sections 13(d) and 13(g), any person, in determining the amount of outstanding securities of a class of equity securities, may rely upon information set forth in the issuer's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act, unless he knows or has reason to believe that the information contained therein is inaccurate.

(f)(1) Whenever two or more persons are required to file a statement containing the information required by Schedule 13D or Schedule 13G with respect to the same securities, only one statement need be filed: *Provided,* That:

(i) Each person on whose behalf the statement is filed is individually eligible to use the Schedule on which the information is filed;

(ii) Each person on whose behalf the statement is filed is responsible for the timely filing of such statement and any amendments thereto, and for the completeness and accuracy of the information concerning such person contained therein; such person is not responsible for the completeness or accuracy of the information concerning the other persons making the filing, unless

such person knows or has reason to believe that such information is inaccurate; and

(iii) Such statement identifies all such persons, contains the required information with regard to each such person, indicates that such statement is filed on behalf of all such persons, and includes, as an exhibit, their agreement in writing that such a statement is filed on behalf of each of them.

(2) A group's filing obligation may be satisifed either by a single joint filing or by each of the group's members making an individual filing. If the group's members elect to make their own filings, each such filing should identify all members of the group but the information provided concerning the other persons making the filing need only reflect information which the filing persons knows or has reason to know.

PART I

1977 N.H. Senate Journal 455-65

HOUSE MESSAGE
HOUSE REQUESTS CONCURRENCE

First and Second Reading and Referral

HB 684, an act providing for the regulation of business takeovers. To Finance.

SUSPENSION OF RULES

Senator Trowbridge moved that the rules of the senate be so far suspended as to dispense with a public hearing and notice in the journal and to allow HB 684 to be heard at the present time.

(Senate President in the chair)

Sen. TROWBRIDGE: In moving this suspension, I would like you to note that the House, which was reluctant to suspend their own rules, voted just now—271 to 74—to suspend the rules on HB 684 which had a hearing in the House today. The subject matter of HB 684 is coming up on an emergency basis for two reasons. I don't know how many of you are familiar with takeover bids but in 1968 the federal government passed the Williams Act which provided for federal regulation of takeovers. A takeover bid is where a company—you see them in the paper—a big offer to acquire, offering the shareholders of XYZ Corporation, let's say, $32 per share, and the offerer is trying to buy up the controlling interest in the company. Before 1968, most of these things were done by proxy fights and in proxy fights there was a good deal of legislation—a good deal of notice to the shareholders and to what you call the "target" company—the target that is being taken over, as to what was going on. But since 1968, two things have happened. One was the Williams Act, which only gives ten days for the process to take place. The second is the fact that the stock market is down in a way that a great many of the shares on

the market, of public corporations, do not reflect their underlying net worth and so there has become a whole series of what they call "raider" corporations who are conglomerates who either have a good deal of assets, money, or whatever. Instead of trying to merge or acquire by exchange of shares, they simply get a lot of money collected from the investment banking world and within a ten-day period go and make a raid on a usually smaller but profitable corporation. This practice has gone and a lot of people have been involved. In New Hampshire we have seen the same thing happen and I note that in the Concord Monitor of this day is a story—not that we have any Monitors—credibility is awfully high at this moment—but by Tom Ferriter, which is a very good story, about the MPB Corporation in Keene and how it had its troubles last year. What happened and is happening now to another corporation in this state, which—1,100 people in my area right at this time—they can see on the stock market an unusual churning and buying up of shares. They know the activity is going on. It is reported on the Board. But they have no way of knowing who is doing it. There is no disclosure factor under the New York Stock Exchange Rules. A tender offer has to be out for ten days. The same thing in the Williams Act says that you must disclose everything ten days *after* you make the offer. So you can have a short period of ten days there when not everything is disclosed but the tender offer is being made to the shareholders. I was told today—I am not that much acquainted with this area—that what happens is that on a Friday afternoon at 4:30, the raider goes to the S.E.C. in Washington, files his tender offer and it comes out in the Wall Street Journal and the New York Times and other papers Monday morning, that the ten days are already three days running and the attempt, of course, is to make an attractive offer that looks attractive on its face. On some stock that is going at $20 per share there is an offer of $32. The shareholder receives this and knows nothing more except the fact that he is going to trade his $20 for $32. It could be a good deal for him and it could be a bad deal. But that is the problem. Because there was this growing problem, 23 states in the Union have passed laws

which are very similar to HB 684. These would say—HB 684 says that there be a 20-day disclosure period of any corporation that is applying for more than 20% of any stock of New Hampshire corporations, and they have to file with the Insurance Commissioner of New Hampshire all disclosure as to who they are, what they intend to do with the company, whether there is any trust violation or any other problems. The bill is quite explicit as to what they have to file and gives adjunctive relief to a New Hampshire Corporation if this procedure is not followed. I suppose there will probably have to be general federal legislation in this area sometime because there is the possibility that federal regulation would supersede, but, as of now, 23 other states have seen it in their best interests to put in this kind of law in order that we do not leave our corporations unprotected. And unprotected they are because you have a nice little New Hampshire corporation that is going along employing 1,100 people, behaving itself, being a good responsible citizen in the Peterboro area, then you see Kayser-Rolf Company, or somebody else come bobbing in here, buy up their stock. Their people leave and who have you got left? We have seen enough of this. Now, in the MPB situation, they saw the handwriting on the wall and all of this activity in their stock, so they went and got what they call the "White Knight". The white knight—you have the Raider, the Target, and the White Knight—the White Knight is someone whom they would just as soon merge with rather than have the unknown take them over. And in that case, of course, they went to Wheelabrator-Frye and that merger was consummated on a friendly basis. Still and all, it is pretty tough to see people of small companies have to kind of merge in order to get away from the threat of being bought up. It really only applies to those firms which have publicly held stock, because, obviously, if it is closely held, nobody can buy the stock up without the knowledge of the stockholders who are the owners anyhow. So it normally applies to our companies who have some publicly traded stock. Now, tomorrow is Friday. The stock of this company churned on Monday and it could be that this Friday is going to be the

day when they make the tender offer for this company. That is why Representative Morgan of Peterborough and myself are asking your indulgence for suspension of the rules on this bill because I hope that we will be able to have this bill signed into law by Friday. There was no opposition at the hearing. There really isn't any countervailing person who would object except for the New York firms who specialize in raids. If there were a serious problem with the bill or some opposition, I could see how you would say "let's look at it longer", but I read it through rather carefully between this morning and now and I think it reads in a relatively straightforward shape because it does not prevent legitimate tender offers by legitimate corporations to someone they are trying to woo. In other words, they can still do it. Let's say you have XYZ Corporation and their management isn't doing that much and the other company thinks that it is really worth a lot more in the right hands. They can still make a tender offer. All they have to do is disclose who they are, what their balance sheet is—all of the details. Twenty days later the offer can be made to the shareholder legitimately and off the process goes. In fact, it has been said in an article which I read which is fascinating—a New Yorker magazine which I have a copy—it is a good story about these raiders. But, in fact, for the shareholder, the longer the period of time that the offer is outstanding, the longer the period of time is that another company, seeing what is going on, could come in and make a better offer to the shareholder. So it all benefits the shareholder of the New Hampshire corporations to have a longer period of time instead of being swept up and grabbed by the throat. Obviously, you have to remember that the stockmarket thing is part of the problem. If the shares of these companies were properly evaluated on the marketplace you wouldn't have this problem. But that is the case. A lot of companies are moving now to states which have a law similar to HB 684 in order to have some protection against the raiders. Delaware, where most of the corporations are incorporated, does not have such a law and they are losing corporations like flies. So, here we talk about being a state that wants to attract corporate enterprise. This

is one way, having on the books an anti-take-over law that would be a protection for small firms in this state. So I will stop now. My motion is still to suspend the rules to let it get on second reading. I would be happy to answer any questions, but I really cannot emphasize too much how much this one firm is really anxious for relief from the Legislature and Governor at this time and the only reason it didn't come in sooner was it didn't get drafted. Look at the number—684.

Sen. McLAUGHLIN: A question of Senator Trowbridge. On the last page, the effective date, it takes effect 60 days after it is passed. Do you want that changed to read "immediately"?

Sen. TROWBRIDGE: Thank you. "Immediately". It is a perfect question and the House already amended it to have it take effect upon passage so the bill that is before you contains that amendment.

Sen. BRADLEY: Your remarks were very persuasive to me and I really have no reason not to vote, but I always get nervous with something this large and I was trying to look through it quickly and haven't really had time. What I worry about in this kind of thing is, is the garden variety purchase and sale of companies—more of the kind that I deal with, if you will, in my practice—and all of a sudden something like this comes along and we find out the sale of "Joe's Equipment" to his neighbor, who has decided to buy stock rather than assets or something—for some particular reason—was void because we didn't register it with the Insurance Commissioner. Is there something in here that exempts. . . .?

Sen. TROWBRIDGE: On page 2, very easy. That is why I think this bill is excellent because it does it this way. At the bottom of page 2, it says "takeover bid does not include the offer through a broker, dealer, in the ordinary course of business without solicitation. . . . "—you can read it as well as I on page 3. It exempts anything of not more than 25 persons as shareholders. So that the normal "Joe's Garage" doesn't have 25 shareholders. Those exemptions, I think, take care of all the things I could think of. I went

through it rather carefully this morning. If it hadn't been for that, I would have to say probably the same thing you did, because I don't like rushing to the Senate to do this. None of us would willingly be doing this and I have the assurance of Mr. Morgan's committee and myself and anyone else involved that there were some amendments proposed and we didn't adopt them because we couldn't get them in time. But I think it is the commitment of the sponsors here to make sure that if something comes up, that we bring in a trailer bill that would make sure that no one was hurt by the bill. I think I answered Senator Bradley.

Sen. MONIER: I just rise in support of the motion, I share Senator Bradley's concern with—as a matter of fact, I have my own concern with those that come in one page, particularly on the last night. But the truth of the matter is, when I looked at this, I questioned a couple people and spoke to legal counsel to find out and my own advisor, who is aware of this matter. The question and answer is very simply that this bill does need to be passed and passed very rapidly and this was an agreed-upon procedure which some of us had not been informed of as yet, but I would like to assure my colleague that I looked into it as well. I don't know if that means anything, but I strongly support the motion.

Sen. BOSSIE: I rise in opposition to the motion and I do it extremely reluctantly, I might add. This is a very complicated bill. It is an amendment to what is known as the "Blue Sky Laws of New Hampshire" as regards securities. I don't know if the Senate has individually read this document. It is confusing even to those of us who have been trained in the law. It is highly technical, it deals with financial matters that I think need a lot more study than what it would be. What I would hope—whenever I see these rush bills, it scares me, as it does a number of you, I know. What would happen if this legislature were not in session? These people would have to wait for a period of time. Now, I am not in the business of being a legislator to represent any special interest or group that is about to be taken over. I represent people. I think my people would want me to at least have the opportunity to have a hearing and read this over and

discuss it with the various groups that would appear. I recommend strongly that we let this go through the regular committee study and if it should happen to be a committee of which I am a member—Energy and Consumer Affairs—I certainly would intend to schedule it right away and have it back to the Senate, hopefully, the first week that we were back. I can't imagine any corporation that plans for the future and is planning six months to a year ahead of time, could object to anything like that. I just don't know what this bill imports. I just don't know, and I really don't want to vote on it today.

Sen. TROWBRIDGE: Senator, you are aware that we are not going to be in session next week?

Sen. BOSSIE: Yes.

Sen. TROWBRIDGE: Are you further aware of the fact that a ten-day takeover bid would expire before we came back into session?

Sen. BOSSIE: Yes.

Sen. TROWBRIDGE: And you still feel you would not protect the New Hampshire company?

Sen. BOSSIE: Senator, let me state it this way: As I explained before, how do you know it is protecting the company? How do you know you are not protecting the Board of Directors rather than the people who own it? There is no way we know this. I don't even know your company. You want to tell us the detail. This sort of business for a special company is really not the thing to do in a rush situation.

Sen. TROWBRIDGE: May I respond? I would be happy to give him the details. The details are that this is New Hampshire Ball Bearing Company. The ball bearing industry is really unique to New Hampshire. It was invented in New Hampshire. All that the two companies split way back in the 30's but still MPB and New Hampshire Ball Bearings are two of the biggest employers in our area. The New Hampshire Ball Bearing Company has an absolutely excellent reputation in our area and is home-grown and the people

all work there and live there. They don't live in New York and come up—their management, their stockholders have come to me and Mr. Morgan and said "Hey, we want to run our own company and we don't know who these guys are who are buying up our stock". Now, as I said before, under this provision all it does is give a twenty-day waiting period when they file with the Commisssioner, as to who they are and what they are up to. It could be the Arabs, for all I know. It could be anyone. So I think, Senator Bossie, there are times in the Legislature, when you have to move and move fast when you find a situation, and if you had a situation in the Manchester area where a company was there, which was a good solid employer, and you came in and asked for this, I would go along with you and I have in the past, with everybody, and I think at this time I share the view that you would like to have more time but you don't have more time. Now is the time to move please.

Sen. BOSSIE: As you know, the New Hampshire Ball Bearing is listed on the New York Exchange. Therefor, any offers of tender must comply with the rules and regulations of the Securities and Exchange Commission, who have these notices and these time-periods and everything else. What do you know about that company, having complied with any of the regulations of the S.E.C.? Now, as we know also, in Part II of this question, is that—isn't it true that federal regulation would normally control this sort of legislation rather than local—statewide regulation?

Sen. TROWBRIDGE: I would be happy to answer. No. 1—it is not that New Hampshire Ball Bearing has complied—they complied with every rule of the stock exchange but the New York Stock Exchange only says, as far as I know in the rules, is that the tender offer has to be extended for ten days. In other words, you start day One—it has to be open for ten days. That ten-day period is the problem because in conjunction with the federal act—the Williams Act—full disclosure doesn't have to made until the end of the ten-day period. There is a hole there—a gap—in the federal regulation. Senator Hart, before he died, had a bill in the U.S. Senate to control the situation and to take away this

rapid ten-day period when people come in and "Zap". What we are doing is saying that they will file here when they have acquired 5% of the stock. When they have acquired 5% of the stock, they have to—in other words, ahead of time—during this period of time before the tender offer. If they are buying up stock in New Hampshire corporations, they have to say who is doing it. They have to tell the Insurance Commissioner of New Hampshire who they are. So you don't get to this situation. I know that this is going to help the shareholders of this corporation. They can't be the loser.

Sen. SMITH: A question of Senator Bossie—two questions. If we found next week that the passage of this bill—that the bill had turned women into men and men into women, couldn't we do something about it upon the return to the Senate?

Sen. BOSSIE: I would feel very stupid if I voted for a bill that I hadn't read and if I had changed men into women. . . .

Sen. SMITH: A further question. Would you believe me if I told you that sometimes this process, which I hate to short-cut also, that a person like Idi Amin works a lot faster than we do sometimes?

Sen. BOSSIE: Notwithstanding that, Senator, I have seen and I read it a lot in the Wall Street Journal of these takeovers and I know a lot of times the Board of Directors, who are the managers of the corporations, spend thousands of dollars of their corporate money to fight these takeovers when it may be in the best interests of the stockholders. I don't know and I don't know who is trying to buy our—the ball bearing company. I don't own any stock in it either. The fact remains that we should have this process in a specially complicated bill of this nature. We should take our time to do it and I would appreciate it if I can have it within a ten-day period. I certainly would, but I am just not about to do it.

Sen. MONIER: A question of Senator Trowbridge: Senator, would you indulge me for a moment on a couple of questions I think might help? One is, to the best of your

knowledge, there is no one involved with this bill who holds any stock in the ball bearing company, is there?

Sen. TROWBRIDGE: I don't own stock in the ball bearing and I don't know if Mr. Morgan, who is sitting here—he shakes his head and says "no". To the best of my knowledge, no one in the Legislature owns any shares.

Sen. MONIER: Would you agree with me that—in this particular case, while I am very reluctant, once again, for the same reasons as Senator Bradley expressed but not from any professional training—would you also agree with me that in this particular case we are really dealing with two majors—one of which was already established, already stopped in a sense by a merger with Wheelabrator-Frye, and the other on an occasion in which we are practically in the same instance through another means?

Sen. TROWBRIDGE: Exactly. It is not as if this was the only time this was happening in New Hampshire by any means.

Senator Blaisdell moved the previous question.

Adopted.

Motion to suspend: Senator Bossie requested a roll call. Seconded by Senator Blaisdell.

The following senators voted yea: Lamontagne, Poulsen, Smith, Grander, Bradley, Bergeron, Saggiotes, Monier, Blaisdell, Trowbridge, Rock, McLaughlin, Hancock, Provost, Brown, Downing, Preston and Foley.

The following senators voted nay: Keeney, Healy, Bossie and Fennelly.

18 yeas 4 nays

Adopted.

HB 648, an act providing for the regulation of business takeovers.

Senator Trowbridge moved that HB 684 ought to pass.

Adopted.

Adopted. . . . Ordered to a third reading.

1977 N.H. House Journal 217

PART J

1977 N.H. House Journal 217

HB 684, providing for the regulation of business takeovers. Ought to Pass with Amendment. Rep. Lamy for Commerce and Consumer Affairs.

This bill will make it more difficult for a takeover company to move against its target company without giving the target time to determine the probable outcome and the effect on both its stockholders and employees.

It gives more time than federal law now provides, but does not interfere with normal transactions in the stock of the target company. It is already the law in twenty-three states, and is needed quickly in New Hampshire to meet an emergency situation.

Amendment

PART K

1981 N.H. Senate Bill 44

STATE OF NEW HAMPSHIRE

* * *

1 *Repeal.* RSA 421-A:2, VI(a) (4) relative to an exclusion from the definition of takeover bid is hereby repealed.

2 *Repeal.* RSA 421-A:2, VI(a) (6) relative to an exclusion from the definition of takeover bid is hereby repealed.

3 *Financial Disclosure.* Amend RSA 421-A:3 (supp) as inserted by 1977, 20:1 by striking out in line 2 the words "at least 20 days prior thereto" and inserting in place thereof the following (as soon as practicable on the date of commencement of the takeover bid) so that said section as amended shall read as follows:

421-A:3 Requirement of Financial Disclosure. No offeror shall make a takeover bid unless as soon as practicable on the date of commencement of the takeover bid he files with the commissioner and the target company a registration statement containing the information required by RSA 421-A:4 and publicly discloses the material terms of the offer. The registration statement filed with the commissioner shall be accompanied by such fees as may be prescribed under RSA 421-A:9.

4 *Public Hearing Schedule.* Amend RSA 421-A:5 (supp) as inserted by 1977, 20:1 by striking out said section and inserting in place thereof the following:

421-A:5 Scheduling of Public Hearing. Within 20 days after the filing of a registration statement pursuant to this chapter, the commissioner shall order a hearing, if he determines it necessary or appropriate for the protection of offerees in this state, for the purpose of determining compliance with the requirements of this chapter and whether the offeror has provided full and fair disclosure to the offerees of

all material information concerning the takeover bid including the filing of a complete and accurate registration statement. Any initial hearing shall commence within 25 days after the following [sic] of a registration statement.

5 *Issuance of Order.* Amend RSA 421-A:6 II (supp) as inserted by 1977, 20:1 by striking out said paragraph and inserting in place thereof the following:

II. Following completion of a hearing pursuant to RSA 421-A:5 or the conclusion of his investigation conducted pursuant to such section, but in no event later than 55 days after the filing of a registration statement, the commissioner shall determine whether the requirements of this chapter has been met, and shall issue an order containing his conclusions and the reasons therefor. If the requirements of this chapter have been met, such order shall authorize the making or continuation of the takeover bid. If the commissioner finds the requirements of this chapter have not been met, he shall by order prohibit the making or continuation of any takeover bid until such time as full compliance has been accomplished.

6 *Withdrawal of Securities.* Amend RSA 421-A:7, I and II (supp) as inserted by 1977, 20:1 by striking out said paragraphs and inserting in place thereof the following:

I. Securities deposited pursuant to a takeover bid may be withdrawn by an offeree or his attorney-in-fact by demand in writing to the offeror or the depository within 15 business days from the date of commencement of such offer.

II. If an offeror makes a takeover offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant to the offer is greater than the number the offeror has offered to accept and pay for, the securities deposited within 10 days of the date of commencement of such takeover offer or within 10 days from the date that notice of an increase in the consideration offered is first published, sent or given to security holders shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

7 *Severability Section Added.* Amend RSA 421-A by inserting after section 15 the following new section:

421-A:16 Severability. If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected by such invalidity.

8 *Effective Date.* This act shall take effect upon its passage.

PART L

***Eure* v. *NVF Co.*,**
79 CVS 4093 (N.C. Super. Ct. Wake Cty. May 15, 1980),
***appeal dismissed*, ____ N.C. ____,**
____ S.E.2d ____ (1981)

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

79 CVS 4093

THAD EURE, SECRETARY OF STATE OF THE STATE OF NORTH CAROLINA,
Plaintiff,

AND

HUYCK CORPORATION,
Plaintiff-Intervenor

VS

NVF COMPANY,
SECURITY MANAGEMENT CORPORATION,
AND VICTOR POSNER,
Defendants.

JUDGMENT

Each party has moved for summary judgment. The facts are not in dispute and have been stipulated in writing. Declaratory relief interpreting the North Carolina Tender Offer Disclosure Act, G.S. 78B-1, et seq., is sought. The constitutionality of this North Carolina Act has been properly raised.

There are no issues of fact to be submitted to a jury, only questions of law for the court.

In declaring the meaning of the North Carolina Tender Offer Disclosure Act, the court gives interpretations and makes conclusions as follows:

1. The subject matter is the buying and selling of stocks. Investors are the parties sought to be protected by legislation. Tender offer is the thing being interpreted. A definition is in the statute. The timing of and requirement of "disclosure" has caused confusion.

2. The federal law framework for the regulation of tender offers creates a two-tier system. So-called "classic" or "formal" tender offers are regulated by Section 14 of the Securities Exchange Act of 1934, as amended. Open market purchases are federally regulated by Section 13 of the same act, and by regulation T and Rule 64 of the NYSE.

3. North Carolina entered the field in 1977 with the enactment of Chapter 78B of the General Statutes. Our Act calls for a unitary system of disclosure, and equates classic tender offer with open market purchase. North Carolina mandates a prepurchase disclosure of 30 days for either method. Federal law does not require any prepurchase statement or filing when the purchase is made in the open market. Federal law does require a disclosure "after" five per cent of stock is acquired, and within ten days. A gap exists as to what is appropriate disclosure and buying practice in the Federal "after" purchase disclosure requirements. Some legislation (not enacted) has been proposed to the Congress to control this gap.

4. North Carolina law requires a "best price" in any tender offer. For open market purchases federal law does not require a "best price", but does require it for those tender offers regulated by Section 14 of the Exchange Act.

5. Is the North Carolina Act regulating open market stock purchases? Yes, by its prepurchase disclosure statement requirements of G.S. 78B-4. Under the stipulated facts of our case the purchases by defendants of Huyck corporate stock in excess of five per cent without any disclosure has had the net effect of being a "creeping" tender offer. Under

the "letter" of the North Carolina Statute, this type of acquisition clearly is "against the law."

6. Is the North Carolina Act constitutional? As applied to the classic, formal type tender offer the answer is yes. As applied to open market purchases, even though they have the real effect of being a creeping tender offer, the answer is no.

7. Congress under the Constitution of the United States has legislated in the field of open market stock purchases in the Securities Exchange Act to the preemption of North Carolina. North Carolina's legislation of G.S. 78B-3 and B-4 is in collision with the commerce clause of the Federal Constitution. The North Carolina purported coverage of open market purchases places an unreasonable extraterritorial burden on open market transactions on national securities markets, and is an undue burden on the free trade area of interstate commerce. Even if Congress has "balled it up," as stated in oral argument, and even if the federal open market purchases with no prepurchase disclosure requirements or inadequate requirements ought to be changed as suggested in proposals for amended legislation, and even though North Carolina in good faith tried to close the loophole, "the United States Constitution gives the right to Congress to ball it up," as was stated to this court by Senator Sam Ervin.

IT IS ORDERED THAT:

1. Any and all provisions of North Carolina General Statute 78B-3 and 78B-4 that apply by its terms to prepurchase disclosure before buying stock in an open market transaction are held to be unconstitutional and invalid.

2. Any and all provisions of N.C. G.S. 78B-3 and 78B-4 that apply by its terms to classic or formal tender offers are held to be constitutional and valid.

3. Summary judgment is granted in favor of the defendants.

This the 15th day of May, 1980.

.....

E. MAURICE BRASWELL
Judge Presiding

PART M

Rule 28.1 Statement

For purposes of Sup. Ct. R. 28.1, the parents, subsidiaries and affiliates of Sharon Steel Corporation and Summit Systems, Incorporated, excluding one hundred percent-owned subsidiaries and affiliates, are as follows:

Alaska Gold Company

Bamco GmbH

Birdsboro Corporation

DWG Corporation

Laypsa S.A.

Leon Water Enterprises, Inc.

NVF Company

NVF Europe S.A.

Pennsylvania Engineering Corporation

Pensa S.A.

Public Gas Company

Richmond-Eureka Mining Company

Ruby Hill Mining Company

Security Management Corporation

Steel Corporation of Texas

Southeastern Public Services Company

Universal Housing & Development Corporation

Wilson Brothers

Motion to Dismiss or Affirm

No. 81-634

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SHARON STEEL CORPORATION and
SUMMIT SYSTEMS, INC.,
Appellants,

v.

INSURANCE COMMISSIONER OF NEW HAMPSHIRE
and NASHUA CORPORATION,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

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Question Presented

Whether application of the New Hampshire Security Takeover Disclosure Act to appellants' solicited block purchases of more than five per cent of the common stock of a corporation headquartered in New Hampshire violates the Commerce and Supremacy Clauses of the Constitution.

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No. 81-634

IN THE

Supreme Court of the United States

October Term, 1981

SHARON STEEL CORPORATION and
SUMMIT SYSTEMS, INC.,

Appellants,

v.

INSURANCE COMMISSIONER OF NEW HAMPSHIRE
and NASHUA CORPORATION,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case respectfully move this Court to dismiss this appeal as not presenting a substantial federal question or, in the alternative, summarily to affirm the judgment of the Supreme Court of New Hampshire on the grounds that the decision below was correct and the circumstances of this case make it inappropriate for full briefing and argument. Sup. Ct. R. 16.1.

Additional Statutory Provision

Section 28(a) of the Securities Exchange Act of 1934, as amended, provides in part:

> "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or

officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1976).

Statement of the Case

The Parties

Appellee the Insurance Commissioner of New Hampshire (the "Commissioner") administers and enforces the New Hampshire Security Takeover Disclosure Act, N.H. Stat. Ann. ch. 421-A (Supp. 1979) (the "New Hampshire Act").

Appellee Nashua Corporation* ("Nashua") has its headquarters in the city of Nashua, New Hampshire, where Nashua and its predecessor firms have been located since 1848. As of April 10, 1980, there were 1,102 shareholders of Nashua resident in New Hampshire, or over 26 per cent of the total number of Nashua shareholders. By a wide margin, this is the largest percentage of Nashua shareholders located in any state or foreign country.

As of December 31, 1980 appellant Sharon Steel Corporation ("Sharon") owned, directly or indirectly through subsidiaries such as appellant Summit Systems, Inc. ("Summit"), over 5 per cent of the equity securities of no less than twelve publicly held corporations. Sharon Steel Corp., Annual Report on Form 10-K for fiscal year ended Dec. 31, 1980 ("Sharon 1980 10-K") at 17-20. *See also* Wall St. J., Oct. 21, 1981, at 16, col. 3 (eastern ed.). Some 86 per cent of the shares of Sharon's common

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* Pursuant to Rule 28.1 of this Court's Rules, Appellee Nashua Corporation states that it has no parent corporation. The only subsidiary (except wholly-owned subsidiaries) or affiliate (*see* 26 U.S.C. §§ 1501, 1502, 1504; Treas. Reg. § 1.1502-1) of Nashua Corporation is Nashua Industrial, S.A. (Mexico).

stock were held, as of February 29, 1981, by NVF Company, 34.5 per cent of whose stock is in turn owned or controlled by Victor Posner, the Chairman of the Board, President and Chief Executive Officer of Sharon. Sharon 1980 10-K at 27, 75.

Appellants' Takeover Bid

Under the New Hampshire Act, the term "takeover bid", subject to certain exceptions, is defined to include, among other things, the acquisition of more than five per cent of the equity securities of a corporation either incorporated or having its principal place of business in the state. N.H. Rev. Stat. Ann. ch. 421-A:2(VI).

Sharon and Summit began their takeover bid for Nashua with a block purchase of 85,000 shares of Nashua stock on October 11, 1979. Within a month, appellants had accumulated, in a series of block purchases, some 6.5 per cent of Nashua's stock, whereupon they publicly announced their holdings in Nashua and filed a Schedule 13D with the Securities and Exchange Commission, pursuant to Section 13(d)(1) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78m(d) (1976) (the "Exchange Act"). Wall St. J., Nov. 27, 1979, at 14, col. 3. The Schedule 13D listed Victor Posner as the ultimate parent of appellants. Sharon Steel Corp., Schedule 13D dated Nov. 23, 1979, at 2. It stated that the stock was "being held as an investment", and that appellants "may at any time determine to increase or decrease" that investment. *Id.* at 5.

Appellants resumed their acquisition program on March 6, 1980 with the first in a series of block purchases of Nashua stock. Thirteen days later, appellants filed an amendment to their original 13D announcing that they now owned more than 10 per cent of Nashua's stock. Appellants' 10 per cent holding makes them the largest single shareholder in Nashua.

Prior State Proceedings

On April 3, 1980, the Commissioner issued a cease and desist order against Victor Posner and his various companies, prohibiting them from purchasing any more Nashua stock pending their compliance with the New Hampshire Act or until they had demonstrated to the Commissioner that their acquisition of that stock was exempt from the Act.

According to the Commissioner, that order "was premised on the undisputed facts that Offerors had acquired more than 5% of the outstanding shares of Nashua common stock and had failed to file a registration statement in accordance with RSA 421-A:3." (Appendix to Jurisdictional Statement ("App.") 28).

On April 8, 1980, the Commissioner filed a petition for injunctive relief in Merrimack County Superior Court and Nashua moved to intervene as a plaintiff. After a hearing on April 23, 1980, the court granted Nashua's motion to intervene and issued an order enforcing the Commissioner's cease and desist order either for sixty days or until the Commissioner determined after hearings that appellants' purchases of Nashua stock were exempt from the Act.

That same day, the Commissioner held the first of two days of hearings to determine whether appellants' acquisition of over 10 per cent of Nashua's stock came within the exemption in the New Hampshire Act for purchases by or through a broker-dealer in the ordinary course of business without solicitation of orders to sell. N.H. Rev. Stat. Ann. ch. 421-A:2(VI)(a)(1).

The Commissioner issued his opinion on June 18, 1980. On the basis of two days of live testimony, numerous affidavits and other documentary evidence, the Commissioner concluded that appellants' acquisition of 10.25 per cent of Nashua stock constituted a takeover bid within the meaning

of the New Hampshire statute. Specifically, the Commissioner found that appellants' purchase program had been accomplished through the widespread solicitation of sellers of Nashua stock and, therefore, did not fall within the "broker-dealer" exemption in the New Hampshire Act (App. 39).

Accordingly, the Commissioner continued in effect his order prohibiting appellants from purchasing additional shares of Nashua stock pending their filing of a registration statement in compliance with the disclosure provisions of the New Hampshire Act. The Commissioner did not order rescission of the purchases already made by appellants, nor did he seek to apply any of the other provisions of the New Hampshire Act relating to withdrawal rights, proration or equal price.

The New Hampshire Supreme Court affirmed the Commissioner's decision and affirmed as well the Commissioner's flexible administrative interpretation and application of the New Hampshire Act to the circumstances of appellants' solicited block purchases. The court also rejected appellants' constitutional challenge to the New Hampshire Act, holding that its application to the particular facts of appellants' takeover bid neither was preempted by federal statute nor posed an impermissible burden on interstate commerce.

APPELLANTS HAVE NOT RAISED A SUBSTANTIAL FEDERAL QUESTION

I.

The Limited Scope of the State Court's Decision and the Special Factual Circumstances of Appellants' Take-over Bid Render This an Inappropriate Case for This Court's Review.

The decision of the New Hampshire Supreme Court rests on an unusual set of facts. It involves a very narrow question regarding the application of the New Hampshire Act to appellants' purchase program and the particular manner in which that program was undertaken. The decision has little or no relevance either to the federal regulation of tender offers or to ordinary open market stock transactions effected in the national securities exchanges.

Thus while appellants seek to posture the Commissioner's order and its affirmance by the New Hampshire Supreme Court as a far-reaching and impermissible regulation of "ordinary stock market trading" (Jurisd. Statement at 11), in actuality, the New Hampshire Act was applied in this case precisely because the Commissioner determined, on the basis of an evidentiary hearing, that appellants' block acquisitions of Nashua stock were not accomplished in the ordinary course of business in anonymous transactions on the floor of the New York Stock Exchange. By its terms, the New Hampshire Act exempts from coverage:

> "An offer by or through a broker-dealer in the ordinary course of his business without solicitation of orders to sell equity securities of the target company". N.H. Rev. Stat. Ann. ch. 421-A:2(VI)(a)(1).

Based on all of the facts presented to him, the Commissioner concluded that appellants' acquisition was not entitled to that exemption. Rather, the Commissioner found that:

> "The evidence clearly shows that Offerors engaged in a course of conduct which had as its natural and forseeable consequence the solicitation of orders to sell Nashua common stock." (App. 38).

According to the Commissioner, "the fact of widespread brokerage solicitation initiated by the [appellants] is undeniable." (App. 37).

Similarly, in appealing the Commissioner's decision, appellants argued before the New Hampshire Supreme Court that their acquisition of Nashua stock solely involved ordinary open market purchases and thus did not constitute a takeover bid (App. 5). The court disagreed. Finding that the appellants could have prevented the solicitation that was found to have taken place, the court noted:

> "*Depending on the accompanying circumstances* . . . open market purchases can be considered as having the essentials of a takeover bid." (App. 6) (emphasis added).

Appellants refer in their Jurisdictional Statement to their purchases as "ordinary stock market trading" (Jurisd. Statement 11) and "commonplace block transactions" (Jurisd. Statement 5). They do not refer to the "accompanying circumstances" (App. 6)—the intentional solicitation of sellers—which led the Commissioner and the New Hampshire Supreme Court to distinguish appellants' acquisition activities from everyday open market stock transactions made in the ordinary course of business.

In their efforts to present the relevant issues as broadly as possible for purposes of their Jurisdictional Statement to

this Court and to gloss over the special circumstances peculiar to their acquisition activities, appellants would, in effect, have this Court reconsider and second-guess the factual and legal findings and enforcement by state authorities of their own state statute. Plainly, the interpretation and application by a state court of a state statute does not present a federal question or provide a basis for invoking the jurisdiction of this Court. *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 513 (1933).

In view of the special factual circumstances involved in appellants' takeover bid, the issues raised by appellants present no substantial federal question. The scope of the Commissioner's order, and its affirmance by the New Hampshire Supreme Court, is in fact narrow and limited. Far from imposing either civil or criminal penalties, as appellants appear to suggest (Jurisd. Statement 10), the order of the Commissioner merely prohibits appellants from purchasing additional Nashua stock pending appellants' filing of a registration statement in compliance with the Act. The widespread interference with the national securities markets and the risks of criminal penalties referred to by appellants are simply not an issue in this particular case.

Indeed, so limited and narrowly tailored is the Commissioner's order (and the judicial affirmance of it) that many provisions of the Act are not even relevant to this controversy. In his flexible enforcement of the New Hampshire Act the Commissioner did not, for example, seek to apply any of the substantive provisions of the New Hampshire Act relating to withdrawal rights or proration. Nor did the Commissioner prohibit appellants' acquisition of 10 per cent of Nashua stock or order rescission of appellants' purchases. *All* that is at issue on this appeal is the Commissioner's order prohibiting appellants from purchas-

ing additional shares pending the filing of a disclosure statement. Thus a decision on the constitutionality of the Commissioner's order may well leave still undecided the constitutional validity of numerous provisions in the Act that were in no way invoked by the Commissioner or relevant to his order or the decision of the New Hampshire Supreme Court.

In short, given the narrow ruling of the New Hampshire Supreme Court and its limitation to the particular acquisition program undertaken by appellants, the issues presented here do not, as appellants argue, have "tremendous significance" either for "the operation of the nation's securities markets" or for "the future of securities litigation in the lower courts" (Jurisd. Statement 7). This Court should not accept jurisdiction of a case the resolution of which may well leave undecided questions of potentially far broader and more substantial impact regarding the constitutionality of state takeover statutes than the narrow issues actually presented here.

That the particular questions actually at issue on this appeal may be of importance to the appellants themselves does not elevate the status of this appeal to that of a substantial federal question. As Mr. Justice Frankfurter put it, "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). *Cf. Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (the Commerce Clause "protects the interstate market, not particular interstate firms").

It is appellants' practice to buy large stakes in publicly traded corporations (*see* page 2 above). Doubtless appellants wish this Court to strike down all state statutes which appellants believe may impede this activity.

Certainly their Jurisdictional Statement mentions many disputes in many states. But this case concerns one application of one statute, the New Hampshire Act. It rests on its own unique facts relating to appellants' solicitation of block sales of Nashua stock. It has nothing to do with tender offers or ordinary open market purchases on stock exchange floors and there is certainly no need for this Court to treat these irrelevant issues here.* As the Court has stated: "As a prudential matter it is our practice to avoid the unecessary decision of novel constitutional questions." *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 181 (1979).

II.

The New Hampshire Act Is Not Preempted Under the Supremacy Clause.

A state statute is not preempted by a federal statute (and thereby unconstitutional under the Supremacy Clause) unless: (1) Congress clearly declares, explicitly or implicitly, its *intention* to preempt the entire field in which the state statute operates; or, in the absence of such a Congressional declaration, (2) the state statute *conflicts* with a federal statute either by precluding "dual compliance" (*i.e.*, making compliance with both statutes a physical impossibility) or by standing as an obstacle to the accomplishment of the federal statute's purposes and objectives. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Appellants in this case can meet neither test.

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* Virtually all of the decisions cited by appellants relating to state takeover statutes involved formal tender offers (*e.g.*, Jurisd. Statement 7-8) and thus revolved around conflicts between the challenged state statutes and the federal statutes and rules governing such offers. Those cases have little relevance to the issues present here.

A. Congress Did Not Expressly or Implicitly Preempt State Takeover Statutes

Existing state statutes carry a strong presumption of constitutionality, *Lemon* v. *Kurtzman*, 411 U.S. 192, 208 (1973); *Telvest, Inc.* v. *Bradshaw*, 618 F.2d 1029, 1033 (4th Cir. 1980), and courts have consistently placed a heavy burden on the party urging that a state statute is preempted by federal activity. *See, e.g., De Canas* v. *Bica*, 424 U.S. 351, 357 (1976); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 45-46 (1966).

In this case, appellants cannot demonstrate that the intent of Congress to preempt is "'clear and manifest.'" *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146 (1963) (citations omitted). It is unquestioned that there is a long tradition of coordinate state and federal regulation in the area of securities regulation—a tradition that preceded the enactment of the Williams Act. For example, state Blue Sky laws concerning the issuance of securities and regulation of broker-dealers have long functioned in conjunction with the Exchange Act and the federal Securities Act of 1933. Indeed, the initial state Blue Sky legislation preceded the parallel federal legislation by over 15 years.

Congress was well aware of this tradition when it enacted the Williams Act. *See* Exchange Act § 28(a), 15 U.S.C. § 78bb(a). For example, the Securities and Exchange Commission ("SEC") reported to Congress in 1963 that "[t]here has not been and should not be Federal preemption in the field of securities regulation." SEC, Special Study of Securities Markets, H.R. Doc. No. 95 (pt. 4), 88th Cong., 1st Sess. 734 (1963). The Williams Act itself was passed as a set of amendments to the Exchange Act, which contained a savings clause in Section 28(a) protecting state jurisdiction. As this Court recently stated in *Leroy*

v. *Great Western United Corp.*, 443 U.S. 173, 182 (1979), Section 28(a) was "plainly intended to protect, rather than to limit, state authority."

Moreover, since 1968, Congress has amended pertinent provisions of the Exchange Act, including the Williams Act, on three occasions without saying a word about preemption, despite the growing number of state takeover laws. *See AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929, 935 (S.D. Ohio 1979); McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 Va. L. Rev. 295, 309-12 (1981).

The fact that Congress said nothing about preemption when it both passed and amended the Williams Act shows that no preemption was contemplated, and indeed manifests a Congressional assumption that there would be dual regulation. In such circumstances, this Court has stated that the silence of Congress actually supports the inference that Congress intended to allow the states to act. *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519, 540 (1979).

Nor does any implicit preemption of the New Hampshire Act emerge from a review of the extent of federal regulation of securities or of the dominance of the federal interest in securities regulation. This Court has recognized that state and federal regulations operate concurrently here. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). The Williams Act is a minimum disclosure statute which leaves ample room for state regulation. It does not pervade the field of securities regulation as it touches upon tender offers and other acquisitions involving potential changes in corporate control.

B. Appellants Cannot Show a Frustration of Federal Purpose

Given the absence of any Congressional intent to preempt, in order to prevail, appellants must demonstrate that the Commissioner's application of the Act to this takeover bid would produce a direct and serious conflict with a clearly delineated federal purpose. As this Court has held, state legislation, to be preempted, must be " 'absolutely and totally *contradictory* and *repugnant.*' " *Goldstein* v. *California*, 412 U.S. 546, 553 (1973) (quoting Alexander Hamilton in The Federalist No. 32).

In this case, the Williams Act and the New Hampshire Act, far from being in conflict, have the same purpose: the protection of investors. *See, e.g., Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26-31 (1977).

In this particular instance, all that the Commissioner has required of appellants is the filing by appellants of a disclosure statement *after* their acquisition of ten per cent of Nashua's stock. That requirement is consistent both with the Congressional purpose in enacting the Williams Act and with that Act's specific disclosure requirements. Under these circumstances, this Court's instructions are particularly apposite:

> "[W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that *the proper approach is to reconcile 'the operation of both statutory schemes* with one another *rather than holding one completely ousted.'* " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973), *quoting Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963) (emphasis added).

Appellants may not search for " 'conflicts between state and federal regulation where none clearly exists.' " *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 130 (1978) (citations omitted). Instead, this Court has construed statutes in such a way as to avoid findings of unconstitutionality whenever possible. *See, e.g., NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 500 (1979).

Even as applied to other hypothetical stituations not now before this Court, all that appellants can point to is that certain provisions of the New Hampshire Act are "different" from provisions of the Williams Act and that the state statute contains requirements which do not appear in the federal statute (Jurisd. Statement 16). However, a state statute may differ significantly from a federal statute without being preempted by the latter. *See Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). *See also Exxon Corp.* v. *Governor of Maryland,* 437 U.S. at 130; *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 45 (1966); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960).

Appellants here are not in a position of having to violate one statute by complying with the other. There is plainly no impediment to complying both with the pre-acquisition disclosure requirements of the New Hampshire Act and with Section 13(d) of the Williams Act, which requires disclosure of certain information 10 days after the acquisition of 5 per cent of a target company's stock. Furthermore, the fact that Congress chose to require post-acquisition disclosure for purposes of federal regulation in no way leads to the conclusion that different timing provisions for purposes of another jurisdiction's regulation of the same activities stand as an obstacle to a Congressional objective. *See, e.g., Huron Portland Cement Co.* v. *City of Detroit,*

362 U.S. 440 (1960); *AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929, 937 (S.D. Ohio 1979).*

The difference between the New Hampshire Act and federal statutes and regulations, of which appellants make so much, is in fact quite minor. The New Hampshire Act in no way touches on ordinary open market transactions involving less than five per cent of a corporation's stock. Nor indeed does it regulate ordinary open market purchases of more than five per cent. As to those acquisitions of more than five per cent to which the act in fact applies, the only difference between federal regulation and the New Hampshire Act is that the federal rules permit disclosure up to ten days after reaching the five per cent threshold while the New Hampshire Act allows for no such reporting delay.**

Given the clear absence of any actual conflict between the operations of the New Hampshire and federal takeover regulations " 'under the circumstances of this particular case,' " *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977) (citations omitted), as well as the clear absence of preemptive intent by Congress, the Commissioner's enforcement of the New Hampshire Act is not preempted by the Williams Act.

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* While appellants make much of the legislative history of the Williams Act in requiring post-acquisition disclosure, that history on its own terms does not apply to appellants' takeover bid. According to Senator Williams, "disclosure after the transaction avoids upsetting the *free and open auction market* . . . ." (Jurisd. Statement at 17) (emphasis added). However, as the Commissioner and the New Hampshire Supreme Court found, appellants' purchases come under the Act precisely because they were accomplished through solicitation and thus departed from the normal auction market that occurs on the floor of the stock exchange (App. 6, 38-39).

** In this particular instance, all the appellants need do, even now, almost two years *after* their acquisition of more than five per cent of Nashua's stock and almost two years *after* the filing of their Schedule 13D, to comply with the Commissioner's order is to file a registration statement pursuant to the New Hampshire Act.

III.

Enforcement of the New Hampshire Act Against Appellants' Takeover Bid Does Not Impermissibly Burden Interstate Commerce.

The explicit recognition in Section 28(a) of the Exchange Act of the role of the states in regulating securities transactions, coupled with Congress's repeated failure to express any intent to preempt state takeover statutes despite their widespread growth in recent years, manifests the Congressional judgment that the states have a legitimate interest in regulating takeover activities whatever their incidental effects on interstate commerce. This Court has underscored the determinative effect, in the area of securities regulation, of a finding of non-preemption upon the adjudication of a Commerce Clause challenge. In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973), the Court, having concluded that the state securities law in question was not preempted by federal legislation, disposed of the Commerce Clause challenge in a simple paragraph:

> "*What has been said above* [about preemption] *provides the answers to this* [the Commerce Clause] *argument*. It is in line with the principle, long established, that the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation." *Id.* at 140 (emphasis added).

See also Brotherhood of Locomotive Firemen & Enginemen v. *Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129 (1968); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960).

Even apart from questions of preemption, the Commerce Clause analysis applied by this Court to state statutes

affecting interstate commerce provides no basis upon which to strike down the Commissioner's application of the New Hampshire Act to appellants' takeover bid.

This Court has set forth the test for determining whether a particular state statute violates the Commerce Clause as follows:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Commissioner's enforcement of the New Hampshire Act and the New Hampshire Supreme Court's affirmance of his order meet both of these requirements.

A. The New Hampshire Act Regulates Evenhandedly to Effectuate Legitimate Local Interests.

That the New Hampshire Act regulates evenhandedly is plain. It treats all "offerors" alike. It neither "favors local investors" nor does it "insulate local citizens or businesses from interstate commerce." *Strode* v. *Esmark, Inc.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,538 at 97,808 (Ky. Cir. Ct. 1980), *aff'd in part and rev'd in part on other grounds*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,238 (Ky. Ct. App. 1981). *See also AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929, 940 (S.D. Ohio 1979) (Ohio Takeover Act does not operate in favor of Ohio, to the economic detriment of other states).

Nor, as the New Hampshire Supreme Court recognized, can it seriously be disputed that the State of New Hampshire has a legitimate local interest in regulating takeover attempts involving possible changes in control of companies

headquartered in the state—companies which the legislature has judged will likely have a disproportionately large percentage of shareholders located there (App. 12). *See AMCA International Corp.* v. *Krouse,* 482 F. Supp. at 938-39. Moreover, that legislative judgment has been fully borne out in this case. Not only is New Hampshire the location of Nashua's corporate headquarters and the center of its manufacturing operations, it is also the residence of more than 25 per cent of its shareholders.

B. The Commissioner's Application of the Act Does Not Substantially Burden Interstate Commerce.

Finally, the burden imposed on interstate commerce in this instance is in fact negligible. The regulation at issue involves nothing more than the disclosure of information, deemed by the New Hampshire legislature to be an important protection for shareholders who may be faced with a decision as to whether or not to sell their stock to an offeror seeking to exercise influence or control over their company.

In ascertaining the extent of the burdens imposed by state regulation, the appropriate inquiry is: what are the effects and costs of compliance. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Rock Island & Pacific Railroad,* 393 U.S. 129, 140-42 (1968). While appellants assert that enforcement of the New Hampshire Act burdens interstate commerce even to the point of "freezing" ordinary stock market transactions (Jurisd. Statement 11), even a cursory consideration of what is being required of appellants in this case makes plain that this supposed burden is totally imaginary. Compliance with the Commissioner's order by filing a disclosure statement, in this case *after* the purchase of more than 10 per cent of the target company's stock, could not conceivably burden appellants, let alone interfere with the workings

of the national stock exchanges or hinder in any way the free flow of interstate commerce.

While appellants assert that the New Hampshire Act substantially burdens interstate commerce, they have not submitted, either to the Commissioner, to the New Hampshire Supreme Court or to this Court, one iota of evidence as to what that burden actually is. The presumptive validity of state statutes cannot be overcome on the basis of unsupported assertion alone. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Rock Island & Pacific Railroad,* 393 U.S. at 138-39; *Telvest, Inc.* v. *Bradshaw,* 618 F.2d 1029, 1036 (4th Cir. 1980). What is more, as the New Hampshire Supreme Court recognized (App. 12), courts that have taken evidence on the question have found that the enforcement of state takeover statutes has not in fact impeded corporate takeovers to the detriment of shareholders. Thus, in *Strode* v. *Esmark, Inc.,* for example, the court found, after a full evidentiary trial, that the history of takeovers in states with takeover statutes "shows that such statutes have no[t] deterred offerors from making tender offers or prevented target companies from being acquired." [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,538 at 97,806. *See also AMCA International Corp.* v. *Krouse,* 482 F. Supp. at 938.

The only burden faced by appellants in their takeover bid for Nashua stock is the result of their own decision not to comply with the New Hampshire Act. However, in assaying a state statute's effect on interstate commerce, it is the cost and effects of compliance, not the obviously more burdensome costs of noncompliance, that must be examined. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Rock Island & Pacific Railroad,* 393 U.S. at 140-42; *AMCA International Corp.* v. *Krouse,* 482 F. Supp. at 939; Note, *The Constitutionality of State Takeover Statutes:*

A Response to Great Western, 53 N.Y.U. L. Rev. 872, 923 (1978).

The important and legitimate interest of investor protection furthered by the Act outweighs the negligible burden that may result from its enforcement in this case. The application of the Act to appellants' takeover bid plainly satisfies the balancing test which this Court has recognized is the touchstone of any Commerce Clause analysis. *E.g.*, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Appellants' Commerce Clause argument, like their preemption argument, must fail.

CONCLUSION

For all the foregoing reasons, the judgment of the Supreme Court of New Hampshire entered July 2, 1981 should be affirmed or, in the alternative, the appeal should be dismissed.

Dated: October 30, 1981

Respectfully submitted,

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Appellant's Reply Brief

FILED
NOV 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-634

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SHARON STEEL CORPORATION and
SUMMIT SYSTEMS, INC.,
Appellants,

v.

INSURANCE COMMISSIONER OF
NEW HAMPSHIRE and
NASHUA CORPORATION,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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Appellants Sharon Steel Corporation ("Sharon") and Summit Systems, Inc. ("Summit")* submit this Brief in Opposition to the Motion to Dismiss or Affirm ("Motion") by appellees Nashua Corporation ("Nashua") and the Insurance Commissioner of New Hampshire (the "Commissioner").** Appellees' Motion, through its attempt to minimize the serious constitutional infirmities of the decision below, underscores the need for this Court to order full briefing and argument of this case and to reverse the decision below.

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* Pursuant to Sup. Ct. R. 28.1, a list of appellants' parents, subsidiaries and affiliates appears as Appendix ("App.") M to the Jurisdictional ("Juris.") Statement.

** The Commissioner submitted no separate papers, but joined in the motion by Nashua, an intervenor below.

I.

This Appeal Presents Representative and Significant Federal Issues that Should be Decided by this Court

This is the first appeal to consider the constitutionality of applying a typical state anti-takeover statute to general customs and practices of the national securities markets. Few issues today present more significant federal questions concerning the securities laws.

In this case, as is common in the securities industry, appellants purchased blocks of stock from large institutions in the open market. Block transactions of at least 10,000 shares are an integral part of the national securities markets. In 1979, for example, block trades accounted for 25 percent of the shares traded on the New York Stock Exchange. Solodar Affidavit ¶ 18, Exhibit G-14.

Appellants bought Nashua stock in nine transactions. Sharon and Summit's brokers executed three of the transactions on the New York Stock Exchange and six in the over-the-counter market. In each instance the broker first learned that a large institutional customer wished to sell a block of Nashua stock. Thereafter the broker asked appellants if they were interested in buying. App. at 34-36. None of the brokers, buyers, or sellers were located in New Hampshire.

To identify potential sellers, the brokers used two commonplace methods of facilitating block trades, AutEx and internal block trading lists. AutEx provides a national network of interconnecting video terminals among several hundred clients, brokers, and institutions interested in block trading. App. at 4, 36. The terminals display a subscriber's interest in the purchase or sale of a small, medium, or large block of the stock of a particular corporation. App. at 36. Block trading lists are distributed among brokers in a firm and contain lists of "buy and sell indications" for various securities. App. at 36-37.

Each case before this Court must arise in a specific factual context under specific laws. That this appeal rests on

precise, concrete and particular facts is not only to state the obvious, but also what is constitutionally required. An appeal does not lose its significance because it arises out of specific facts. Neither before the New Hampshire Insurance Commissioner nor on appeal to the New Hampshire Supreme Court was there any dispute over the facts. App. at 31, 19, 2-3. The record below shows the block transactions and the stockbroker activities which are at issue here to be commonplace and typical of securities markets generally.

Both the court below and the Commissioner recognized these activities as routine "customs and practices" in the national securities markets. App. at 4, 36. This conclusion was based not on "special factual circumstances involved in appellants' takeover bid," Motion at 8, but on evidence, introduced by Nashua, of "block trading in general," App. at 36, and the actions of stockbrokers which constituted "the customs and practices of the securities industry." App. at 30. Far from being a special case, the record here, built in part by Nashua's own evidence, has wide application in the securities field.

In addition to the representative nature of these facts, the significance of this appeal can be seen from the procedural history of this case and widespread concern over similar issues under other state statutes. It is hard to imagine a case where the procedural history could suggest any more substantial federal question or more carefully developed constitutional arguments.

The constitutional issues emerged at the outset of this case, were argued at every level, and gave this case an early and continued significance for all involved. Sharon and Summit first questioned the constitutionality of the New Hampshire Security Takeover Disclosure Act, N.H. Rev. Stat. Ann. ch. 421-A (Supp. 1979)(the "New Hampshire Act") before the Commissioner. App. at 32. Next, Sharon and Summit appealed to the Superior Court, Merrimack County, which found the constitutional questions to be "hotly contested" in state and federal courts throughout the nation.

App. at 21-23. Accordingly, that court transferred this case without decision directly to the New Hampshire Supreme Court after concluding that to do so could resolve an issue of "immediate and substantial importance" to regulators, corporations, shareholders, and members of the investing public. App. at 25.

The New Hampshire Supreme Court then became the first state court of last resort to consider on the merits the constitutionality of any state anti-takeover statute. The court's consideration was aided by briefs from Nashua and the state's attorney general supporting the statute's constitutionality. Sharon and Summit challenged the statute's constitutionality and were supported by the Securities and Exchange Commission as *amicus curiae*.

Far from being "unusual," the New Hampshire Act is typical of state anti-takeover laws. Of the other thirty-five state anti-takeover statutes, at least fourteen could be applied to block transactions like those made by Sharon and Summit.* Most of these laws have been the subject of constitutional scrutiny.

The courts and legislators need guidance. Although anti-takeover cases such as this one have been crowding the courts for several years, this is the first decision by a state's highest court to rule on the merits. *See* citations in Juris. Statement

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* Virtually identical provisions governing solicited transactions are found in six other state anti-takeover laws. *Compare* N.H. Rev. Stat. Ann. ch. 421-A:2(vi)(a)(1) (Supp. 1979) *with* Alaska Stat. § 45.57.110(C) (1980); Ill. Rev. Stat. Ann. ch. 121 1/2 ¶ 137.52-9(1) (Supp. 1981); Mich. Comp. Laws § 451.904(2)(c) (Supp. 1980); Me. Rev. Stat. ch. 23 § 802(16)(B)(4) (Supp. 1980); Miss. Code § 75-72-103(h)(i) (Supp. 1981); N.J. Stat. Ann. § 49:5-2.1(2)(f) (Supp. 1980). Eight other state anti-takeover laws are similar. *See* Col. Rev. Stat. § 11-51.5-102(5)(d)(Cum. Supp. 1980); Del. Code Ann. tit. 8, § 203(c)(3)(b) (Supp. 1980); Mo. Ann. Stat. § 409.505(3)(b)(Vernon 1979); Nev. Rev. Stat. § 78.377(2)(d) (Supp. 1979); Pa. Stat. Ann. tit. 70 § 73 (Supp. 1981); 1981 S.C. Laws, H.B. 2016, § 3(a); S. Dak. Code Ann. § 47-32-2(1) (Supp. 1981); Tenn. Code Ann. § 48-2102(10)(a) (1979).

at 8-9. Meanwhile, under different perceptions of constitutional boundaries, state legislators struggle to rework their laws. *See* citations in Juris. Statement at 8 n.2. Only this Court, as the ultimate arbiter of the Constitution, can resolve these problems.

The aspects of the Act at issue here—the constitutionality of the Act's application to typical open-market block purchases on the nation's securities markets—are central.* Appellants need not put in issue each portion of a statute to raise a substantial federal question. Substantiality of a federal question is not determined by counting statutory provisions. Indeed, the New Hampshire Supreme Court's opinion is in no way limited to a narrow set of facts or to only certain provisions.

Rather than the end of the process, as appellees suggest, the filing of a registration statement is just the beginning. At a minimum, appellants would be prohibited from purchasing Nashua stock for 20 days. Such advance disclosure distorts the market balance of stock supply and demand, manipulating the market price. Juris. Statement at 12. Filing a registration statement would also subject appellants to the Commissioner's jurisdiction and his full range of administrative powers, which may delay purchases by as many as 120 days, or even longer. See Juris. Statement at 15-16. Meanwhile, unless and until appellants file a registration statement consistent with New Hampshire law, appellants are prohibited from purchasing any Nashua stock from any willing seller on any securities market throughout the nation.

To dismiss this appeal without addressing the merits, to forego an opportunity to resolve recurring and significant

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* Despite appellees' suggestion to the contrary, appellants do not seek review of the Commissioner's or the New Hampshire Supreme Court's interpretation of the New Hampshire Act. This was made quite clear at the outset. Juris. Statement at 6 n.2. What is before this Court is the New Hampshire Supreme Court's ruling that no constitutional problems arise from the application of the New Hampshire Act to appellants' purchases.

questions, and to leave intact the burdens placed on interstate commerce and the state intrusion upon federal objectives would be contrary to the role of the Supreme Court and the efficient operation of the nation's securities markets.

II.

The New Hampshire Act, by Standing as an Obstacle to the Purposes and Objectives of Congress, is Preempted

The test of preemption on which this case rests is whether the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." App. A at 7; Juris. Statement at 14. Appellees' lengthy discussion of explicit and implicit preemption, Motion at 10-12, is irrelevant.

The federal securities laws are designed to protect investors without creating a regulatory bias in favor of the issuer. Juris. Statement at 14. By contrast, the principal purpose of the New Hampshire Act, as shown by the legislative history, is the protection of local business. *Id.* Appellees' assertion that both laws have the same purpose does not address the legislative history or the pro-management provisions inherent in the New Hampshire Act. *See* Juris. Statement at 15-16. It is just these conflicts between the federal and New Hampshire laws which result in a profound regulatory bias in favor of New Hampshire corporations and against investors no matter where they are located.

As to the other major conflict between the New Hampshire and federal laws, the timing of disclosure, appellees acknowledge the incompatibility but attempt to diminish its significance by labeling the two statutes merely as "different." Moreover, appellees' repeated claim that Sharon and Summit need make disclosure only *after* their purchase of Nashua stock misses the point: the New Hampshire Act does not require disclosure *after* purchase; the Act requires disclosure *before* purchase.

Appellees' analysis of the conflict in timing of disclosure is faulty on another ground. Appellees argue that Senator

Williams was concerned only that advance disclosure of open market purchases would upset "the free and open auction market," Motion at 15 n.1, and that appellants' purchases were not made in an auction market. However, appellees fail to note that three of appellants' purchases were executed on the classic auction market—the New York Stock Exchange. Appellees also ignore Senator Williams' concluding admonition that advance disclosure would be equally disruptive to "privately negotiated transactions." Juris. Statement at 17. Appellants' remaining purchases were just such transactions.

The New Hampshire Act, weighted heavily towards management and with an objective at odds with federal provisions as to the timing of disclosure, frustrates the purpose of the federal act.

III.

The Burden of the New Hampshire Act on Interstate Commerce is Substantial

The burden on interstate commerce is real, significant and amply demonstrated below. It is undisputed that compliance with the New Hampshire Act freezes trading by purchasers such as Sharon and Summit for at least 20, and perhaps more than 120, days. It is also undisputed, as the SEC argued below, that such a freeze in trading seriously disrupts the nation's securities markets by distorting prices and traditional trading patterns.

The issues of burden on commerce and preemption are separate questions not linked by a common analytical framework. Although the constitutional flaws Sharon and Summit identify emanate from the same statute, the burden on commerce imposed by complying with the New Hampshire Act stands as an independent obstacle to affirmance of the decision below.

To justify state regulation of interstate commerce, a state must show both the unavailability of non-discriminatory alternatives and the local benefits of the existing statute.

Hughes v. *Oklahoma,* 441 U.S. 322, 336 (1976). Appellees have failed on both counts.

As to the unavailability of non-discriminatory alternatives, the Commissioner identified no alternative means of protecting resident shareholders, much less their non-discriminatory character. Understandably, the opinions below are devoid of any examination of such alternatives.

Regarding the purported local benefits, the only local interest identified is regulating takeover attempts of companies with headquarters in the state, which are supposed to have a large number of resident shareholders. Motion at 17-18; App. A at 12. Such an interest has been rejected where, as here, the state statute is not drafted in terms of shareholder residence. *See, e.g., Hi-Shear Industries, Inc.* v. *Campbell,* [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804, at 90,033 (D.S.C. Dec. 4, 1980). Nor can such an interest make any sense where, as here, less than fifteen percent of Nashua's stock is owned by New Hampshire residents and half of that in one block, and the Act's stated purpose is the protection not of local shareholders but of local business. N.H. Sen. Journal 455-65 (1977) (remarks of Sen. Trowbridge), App. I at 69-79; N.H. House Journal 217 (1977), App. J at 80.

The New Hampshire Act and the Commissioner's Order apply not only to New Hampshire residents, but also to securities transactions between non-residents on national securities markets. Indeed, despite appellees' claim that the New Hampshire Act protects local investors, no Nashua stock was sold to Sharon or Summit by shareholders from New Hampshire. On the contrary, all sellers were major financial institutions with headquarters outside New Hampshire. The burden on interstate commerce, resulting from the application of the New Hampshire Act to this case, is direct and substantial.

Conclusion

This Court should not permit appellees' Motion to obscure or reduce the importance of the issues in this case. Sharon and Summit respectfully request that this Court deny appellees' Motion to Dismiss or Affirm.

Dated: November 16, 1981

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